Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOHN UNGER, II, JOHN OVERINGTON, ELIZABETH BLAKE, GREGORY CORLISS, JERRY M. MAYS, KENNETH MAYS, BILL MOORE, SHIRLEY MOORE, CLARENCE PENNINGTON, WILLIAM C. RITCHIE and PHILLIP SPRIGGS,

Appellants,

v.

JOSEPH MANCHIN, III, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of West Virginia

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

WHETHER THE REASONS SET FORTH BY WEST VIRGINIA ARE SUFFICIENT TO JUSTIFY DILUTION OF THE STATE SENATE VOTES OF OVER THREE-FOURTHS OF A MILLION WEST VIRGINIANS WHERE 1) WEST VIRGINIA VIOLATED ITS STATE CONSTITUTION BY DIVIDING ELEVEN COUNTIES; AND 2) THE REASONS CITED TO JUSTIFY THE VIOLATION OF THE EQUAL PROTECTION CLAUSE WERE NOT CONSISTENTLY APPLIED.

PARTIES TO THE PROCEEDING

John Unger, II, John Overington, Elizabeth Blake, Gregory Corliss, Jerry M. Mays, Kenneth Mays, Bill Moore, Shirley Moore, Clarence Pennington, William C. Ritchie and Phillip Spriggs were the plaintiffs in the District Court and are the appellants in this Court. Joseph Manchin, III, Robert Wise, Earl Ray Tomblin, and Robert S. Kiss were defendants in the District Court and are appellees in this Court.

Plaintiffs:

1. John Unger
2. John Overington
3. Elizabeth Blake
4. Gregory Corliss
5. Jerry M. Mays
6. Kenneth Mays
7. Bill Moore
8. Shirley Moore
9. Clarence Pennington
10. William C. Ritchie
11. Phillip Spriggs

Defendants:

1. Joseph Manchin, III, Secretary of State
2. Robert Wise, Governor
3. Earl Ray Tomblin, Senate President
4. Robert S. Kiss, Speaker of the House of Delegates

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OPINION AND ORDER BELOW

The Opinion and Order are reprinted in full in the Appendix at App. 1-19.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1253 to review the District Court's orders issued in the senate redistricting case. Plaintiffs-appellants filed their notice of appeal on February 25, 2002, within the time specified in 28 U.S.C. §2101(b). Appellants' Jurisdictional Statement Appendix ("App.") at 20-22.

RELEVANT STATUTE

The West Virginia Code, §1-2-1, as amended by H.B. 511 is reprinted at App. 23-35.

STATEMENT OF THE CASE

In a state senate redistricting scheme signed into law on October 4, 2001, West Virginia drafted new lines for its 17 Senate Districts. Redistricting is required after each census by Article VI, §4 of the West Virginia Constitution, as follows:

> For the election of senators, the state shall be divided into twelve senatorial districts, which number shall not be diminished, but may be increased as hereinafter provided. Every district shall elect two senators, but, where the

> district is composed of more than one county, both shall not be chosen from the same county. The districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States. After every such census, the Legislature shall alter the senatorial districts, so far as may be necessary to make them conform to the foregoing provision.

West Virginia Constitution, Article VI, Section 4.

West Virginia has, since 1965, had 17 state Senate Districts with 2 members per district. Based upon the state's 2000 population of 1,808,344, the ideal senate district would be 106,374 people. Kanawha County, the most populous county with 200,073 persons in its two districts, has a population deviation of 5.96% below the average. Thus, any district more than 4.04% above ideal size has a deviation of more than 10%.

Kanawha County is home to Charleston, the state Capitol. Charleston is a small city of approximately 50,000. As the county grew in the 1950s and 1960s, it exceeded the size which could be represented by two of West Virginia's then-32 Senators. In 1965, West Virginia expanded the number of Senators from 32 to 34, and the number of Senate Districts from 16 to 17. The new Senate District 17 was superimposed upon Kanawha County's existing Senate District 8. The new double district gave Kanawha County four senators. In the 1980s and 1990s, Kanawha County lost population, both in comparison to other areas of the state and in real terms. Its population is

no longer sufficient to support four Senators without causing equal population problems.

Of the seventeen districts, seven have deviations so far *above* the average as to create a maximum deviation greater than 10%. The total population of these seven districts is 779,025. Over 43% of all West Virginians live in senate districts which make out a *prima facie* violation of the Equal Protection Clause.

Because West Virginia's population has been shifting for many years from the south and southwest (the coal region) to one county near the center of the state (Putnam) and several counties in the east (the Eastern Panhandle), the legislature which voted on the scheme at issue here was wildly unbalanced.

After 10 years of population shifts, Senate District Six (the heart of the southern coalfields) contained only 86,966 persons. *See* App. 41. By contrast, District 16, comprised of Jefferson, Berkeley and Morgan Counties in the Eastern Panhandle, contained 133,038 persons, a maximum deviation of over 44,000, or approximately 43 percent. *See* App. 50. Clearly, redistricting was required under both the state and federal constitutions. The political decision to which the District Court paid such deference here was reached by a legislature which was heavily overrepresented in the areas which got more senators than equal protection permits, and heavily *under*represented in the areas which received too few senators. Thus, the massive population shifts – which required redistricting – also affected the process. Put another way, 133,038 residents of the Eastern Panhandle had only two votes on the legislation, while 86,966 residents of District

6 also had two votes. In such a climate, it is unsurprising that the traditionally underrepresented areas were once again underrepresented after passage of H.B. 511.

The map created by H.B. 511 appears at App. 51. Some detail is lost in the map which bears upon the validity of the reasons set forth by West Virginia to justify the 10.92% maximum deviation. Despite the mandatory language of the West Virginia Constitution, Article VI, §4, eleven counties were split, some more than once. Wheeling Island, a portion of Ohio County which is located in the Ohio River, was split with little or no effect upon population balance. Upshur County, in the center of the state, was split with little to no effect upon equality of population. Some 7,532 persons in Wayne County were placed with Cabell County in District 5, in the course of dividing Wayne County into 3 fragments.

These are but a few of the instances in which the reasons set forth in the statute were either not consistently applied, or were violative of the state constitution, or both.

The statute sets forth five reasons to justify the population imbalance achieved in H.B. 511. They are:

> [T]he Legislature, in dividing the state into senatorial districts, as described and constituted in subsection (d) of this section has: (1) Adhered to the equality of population concept, while at the same time recognizing that from the formation of this state in the year one thousand eight hundred sixty-three, each constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of

> government have been implemented along political subdivision lines; (2) Made the senatorial districts as compact as possible, consistent with the equality of population consent; (3) Formed the senatorial districts of "contiguous territory" as that term has been construed and applied by the West Virginia Supreme Court of Appeals; (4) Deviated from the long-established state policy, recognized in subdivision (1) above, by crossing county lines only when necessary to ensure that all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population; and (5) Also taken into account in crossing county lines, to the extent feasible, the community of interests of the people involved.

H.B. 511, App. 23, at 24.

1. West Virginia did not "adhere to the equality of population concept." H.B. 511 is *prima facie* unconstitutional. West Virginia split eleven counties, three of them into three fragments. Each time it drew a district not bounded by county lines, a separate violation of Article VI, Section 4 occurred. Fully fourteen of the seventeen senate districts, or 82%, violate the state constitution.

2. Compactness is not at issue in this case, though no population imbalance was shown to be incident to the quest for compactness.

3. All the districts are comprised of contiguous territory, yet West Virginia made no showing that the population irregularities in this plan

were incident to the quest for contiguous districts.

4. This is simply false. Ohio County (Districts 1-2) was split for reasons that make no difference in equal population analysis, as was Upshur County (Districts 11-15).

5. West Virginia used this approach with Kanawha County, but not in Senate District 15, which combines rural timber producing counties with portions of the Washington-Baltimore Metropolitan Statistical Area, and not in Monongalia County, which is split into three sections. Marion County was split in two, yet there is no suggestion that its eastern and western halves do not share a "community of interest." No showing was made by West Virginia (which bore the burden of proof) that population inequality resulted from pursuit of this goal.

Suit was filed in this matter on October 22, 2001, by the parties who seek this appeal. They are: John Unger, II, John Overington, Elizabeth Blake, Gregory Corliss, Jerry M. Mays, Kenneth Mays, Bill Moore, Shirley Moore, Clarence Pennington, William C. Ritchie, and Phillip Spriggs.

The case was styled *Unger, et al. v. Manchin, et al.*, Civil Action No. 3:01cv75 (N.D.W.Va.). The next day, another group of plaintiffs filed a suit in the Southern District of West Virginia, raising the same claims regarding the senate redistricting. That case was styled *Deem, et al. v. Manchin, et al.*, Civil Action No. 3:01cv78. The cases were consolidated in the Northern District of West Virginia. Finally, three county commissioners from Mason

County intervened with claims that the House of Delegates redistricting was unconstitutional, relying solely on the state constitution. The case, styled *Handley v. Manchin, et al.*, was dismissed by the District Court for want of federal jurisdiction. The dismissal of the Intervenors' claims is not appealed here.

The District Court analyzed the claims of Unger and the other Plaintiffs below, and its Memorandum Opinion and Judgment order appear at App. 1-19.

The Court below found that West Virginia's division of counties and voting districts "directly contravenes" Article VI, §4 of the West Virginia Constitution's "bounded by county lines" requirement. App. 5. The District Court said, however, that the state legislature had, in every reapportionment since 1977, "found and declared that it is not possible to comply with this requirement and, at the same time, meet the one man, one vote requirement." App. 6.

Appellants attempted during the litigation to take depositions of the Legislative Redistricting Staff, the group of employees who, using software provided by the U.S. Census Bureau, draw maps and plan summaries such as those in the appendix. Among other things, counsel sought to find out whether anyone in the legislature had ever requested of the staff that they attempt to test the question of whether "bounded by county lines" and one-man, one-vote were mutually exclusive concepts. The requests were denied by the District Court. *See* App. 10. (fn 1).

Counsel for the Appellants did obtain copies of the dozens of plans submitted to the Legislature; several of them cut fewer counties and were within 10% deviation.

There is no evidence that anyone in the legislature or on the staff ever attempted to draw a plan which added or subtracted Senate Districts or which used "superimposed" districts, such as Districts 8 and 17, elsewhere in the state. Both of these were means by which ideal district populations could be expanded or shrunk to more closely fit West Virginia's unique contours. Had one senate district been added, the ideal district size would have been 100,463, and the Kanawha deviation with four senators would have been only .04%.

Thus, it is unresolved whether West Virginia's claim of the impossibility of reconciling "bounded by county lines" and equal protection is even true. What is perfectly clear is that, with even one line change (including Roane County with Kanawha), West Virginia could have had fewer split counties *and* less population deviation. *See* Plan 28e5, App. 71. (Ten split counties, 9.5% deviation, App. 72.)

Appellants sought to have the District Court strike down the plan as violative of the Fourteenth Amendment's Equal Protection guarantees, and enjoin the Secretary of State from conducting or certifying elections held pursuant to the statute. Instead, the District Court dismissed Appellants' claims on Motion for Summary Judgment. Appellants bring this appeal.

ARGUMENT – THE QUESTION PRESENTED IS SUBSTANTIAL

In *Mahan v. Howell*, 410 U.S. 315 (1973), this court examined a Virginia reapportionment plan with a 16.4% maximum deviation. The justification offered by Virginia was a long, consistent practice of conforming its delegate districts to political subdivision lines, and a recent constitutional amendment which had granted political subdivisions the power to seek to have local legislation enacted.

The court framed the initial question as follows:

> . . . [W]hether it can reasonably be said that the state policy urged by Virginia to justify the divergences in the legislative reapportionment plan of the House is, indeed, furthered by the plan adopted by the legislature. . . .

Mahan v. Howell, 410 U.S., at 326.

The *Mahan* court noted that uncontradicted evidence in the District Court had established that "the legislature's plan, subject to minor qualifications, produces the minimum deviation above and below the norm, keeping intact political boundaries." *Id.*, at 327.

The *Mahan* court also had before it a plan drafted by the District Court which resulted in a deviation of slightly more than 10%. The District Court's plan extended across political "subdivision lines in 12 instances, substituting population equality for subdivision representation." *Id.*, at 323.

This Court rejected the District Court's plan and upheld the legislature's plan. Quoting *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held,

> . . . So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.

Mahan v. Howell, 410 U.S., at 325.

In *Brown v. Thomson,* 462 U.S. 835 (1983), this Court affirmed a Wyoming reapportionment with a maximum deviation of some 89%. The Court held that "this case presents an unusually strong example of an apportionment plan the population variations of which are entirely the result of the consistent and nondiscriminatory application of a legitimate state policy." *Brown v. Thomson,* 462 U.S. 835, 844.

Using *Thomson,* the District Court here held that where "the maximum deviation of a plan is less than 10%, the plan is *prima facie* nondiscriminatory. On the other hand, if the maximum deviation exceeds 10%, the plan is *prima facie* violative of equal protection." App. 8. In this case, the 10.92% maximum deviation shifts the burden to West Virginia.

Mahan v. Howell, supra, requires the state to prove that the plan "may reasonably be said to advance" consistently applied, rational and legitimate state policies. *Id.,* at 328.

In *Mahan* and *Thomas,* the Court examined plans which had 1) fairly wide population divergences; and 2) consistently applied legitimate state policies which

caused the population imbalances. Here, the question is different. These are smaller imbalances with rationales that had no causal effect upon the population imbalances at all.

In *Karcher v. Daggett*, 462 U.S. 725 (1983), this Court indicated that the greater the population deviation, the heavier the burden upon the state to justify it. Appellants concede that in both *Mahan* and *Thomson*, larger deviations were approved. Counsel could find no case, however, where a deviation in excess of 10% was justified by a scheme violating the state constitution in 82% of the districts while reserving such rationales as "preserving communities of interest" for the use of only one or two districts.

In *Mahan, supra*, the appellees argued unsuccessfully that Virginia was "inconsistent" in applying the policy of keeping subdivisions whole because it split Fairfax County. Nowhere near that level of consistency has been achieved here. Violation of the state constitution occurred in fourteen of the seventeen districts. This plan has the same fatal flaws as the District Court plan in *Mahan, supra*, and should be rejected for the same reasons.

In selecting the Virginia legislature's plan, with its higher deviations, this Court recognized that the quality of the rationales, and the consistency of their application, are at least as important as the extent of the deviation in determining whether an equal protection violation has occurred.

Each of the five reasons in the statute was consistently ignored in the scheme except with regard to Kanawha County, home to the state capitol, Charleston. The

West Virginia Constitution, Article VI, §4, requires that, where a multi-county Senate District is created, both of the district's two senators may not be from a single county. Thus, Cabell County (District 5), which has a population of some 96,000 persons, has only one senator, while rural Wayne County (7,532 of whose residents were added to Cabell County to boost the population to near the average) gets one of the two district senators. The West Virginia Constitution has a preference for preserving the power of smaller counties linked to larger ones within a single district.

This preference was rejected by both the legislature and the lower court when it came to Kanawha County. One way to raise the population base of Kanawha County sufficiently to make its Districts 8 and 17 support four senators is to add one of the rural counties next to it, and make a two-county set of superimposed districts. In other words, Roane County would be added to Kanawha (which would reduce the overpopulated 4th District nearby) and the entire land mass becomes Districts 8 and 17. Indeed, this would result in fewer split counties (10) and a maximum deviation less than 10%. Such a plan was before the Legislature. *See, e.g.*, Plan 28(e)(5), at App. 71-72.

West Virginia says this solution is unworkable because it would cause residents of Kanawha County to be represented by Roane Countians. The District Court held that it could not find such a motivation irrational. West Virginia sought a means by which to avoid the "one senator per county" requirement and found it in a 5.96% deviation. While it may not be irrational to seek to avoid the requirement, it was certainly not consistently applied

and it cannot justify an equal protection violation. In District 5, a sliver of a largely rural county was added to a more urban county to bring the population near the average. Wayne County has a resident senator because the state constitution requires it. The population imbalance here was driven by a desire to avoid the requirements of the state constitution. Contrast this with the situation in *Mahan v. Howell, supra* and *Brown v. Thomson, supra*. In both of those cases, the court found that *adherence* to long practice or state constitutional provisions might justify imbalances which arose because of the consistent application of the policies. Here, the overwhelming evidence shows violation of the "bounded by county lines" requirement occurred in 14 of the 17 senate districts, and that refusal to follow the dictates of the state constitution's preference for no more than one senator per county left Kanawha County with too small a population to support four senators. The population deviations here were *not* incident to the effectuation of a rational state policy.

The evidence is that with regard to the reasons in the legislation, inconsistent application was the norm.

The trends which have so distorted the inter-district population balance in this slow-growing state are still in place, and likely to continue. After the 2010 Census, a vastly overrepresented southern West Virginia will once again be poised to overpopulate the growth districts which, because they are overpopulated and underrepresented, will not have the votes to change the outcome. Because of the District Court's ruling, 10% maximum deviation will no longer seem a barrier to the legislature.

If the standards of *Mahan v. Howell* were properly applied, the result would be rejection of the 3-judge panel's decision.

Virginia had no constitutional requirement prohibiting splitting counties.

West Virginia has a constitutional requirement prohibiting splitting counties.

Virginia had a long practice of adherence to a policy of not splitting political subdivisions.

West Virginia has long practice of splitting them in violation of the state constitution.

In *Mahan*, this Court rejected a District Court-drafted plan which exceeded 10% maximum deviation, on the basis that it split too many political subdivisions. The Court said,

> Scott County, for example, under the Assembly's plan, was placed in the first district and its population of 24,376 voted with the 76,346 persons in Dickinson, Lee, and Wise Counties for two delegates. The district thus established deviated by 8.3% from the ideal. The court transferred five of Scott County's enumeration districts, containing 6,063 persons, to the contiguous second district composed of the city of Bristol, and Smith and Washington Counties, population 87,041. Scott County's representation was thereby substantially reduced in the first district and all but non-existent in the second district.

Id. at 324.

It was incontrovertible that the District Court's plan forced Virginia to sacrifice the power of political subdivisions to gain a more equal population distribution. There was, in *Mahan*, a clearly demonstrated tension between the power of counties and population equality.

There is no similar dynamic in the case at hand. Indeed, the clear evidence before the Court is that despite the state constitution's mandate that counties not be split, and its mandate that smaller counties retain power in multi-county districts, West Virginia *increased* population disparities while *increasing* the number of counties split to an all-time high. Moreover, 14 of the 17 districts here had the same problem as Scott County, Virginia, except this is not just a violation of custom, it is a violation of the state constitution.

In *Mahan*, this Court found that where strict population equality conflicted with the goal of keeping counties whole, a certain amount of inequality would be acceptable based upon "legitimate considerations *incident to* the effectuation of a rational state policy" (Emphasis added.) *Mahan, supra*, at 326.

There was no conflict here between counties' political power and population equality. The District Court found that in "two or three instances . . . the plan rather cavalierly violates the objective of crossing county lines only when necessary. . . . " App. 12.

In fact, the record shows that two counties, Upshur in the Seventh and Fourteenth Districts and Ohio in the First and Second Districts, were split when to do so violated not only the West Virginia Constitution but other

goals stated in the legislation as well, while having no appreciable effect upon population equality at all.[1]

West Virginia did not show here that it was impossible to achieve equality and avoid splitting counties. The legislature merely said so, and the District Court believed it.

If effectuation of the stated goals did not drive the divergence from population equality, what did?

Kanawha County.

Only in Kanawha County did West Virginia attempt to serve the goals in H.B. 511.

Only in Kanawha County's two senate districts (and one other) did West Virginia avoid splitting counties.

Only in Kanawha County, and the shrinking southern coalfields, did West Virginia concern itself with keeping communities of interest whole.

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[1] While the District Court seemed to accept as a given that it was impossible to achieve population equality while adhering to the "bounded by county lines" requirement, the West Virginia Supreme Court of Appeals is not so sure. *See, e.g., White v. Manchin*, 173 W. Va. 526, 318 S.E. 2d 470 (1984). In discussing Art. VI, § 4, the Court noted the impossibility claim by the legislature and said, "we are of the opinion that senatorial districts could be drawn which would comply with both state and federal constitutions." *White, supra*, 318 S.E. 2d 470, 488, n.8. This case was cited to the District Court below but not addressed. Had plaintiffs been permitted discovery, it might well have shown that significant gains could have been made in both population equality and compliance with the "bounded by county lines" requirement.

In other areas of the state where population declines occurred, counties or parts of counties were added to achieve population equality. Not in Kanawha. In Senate District 15, all or part of 9 counties stretching 200 miles from Marlinton, Pocahontas County, to Hedgesville, Berkeley County, were cobbled together, throwing mountainous rural timber counties and their interests in with counties which are a part of the Washington-Baltimore Metropolitan Statistical area. This is not a "community of interest," but it was done anyway. On the other hand, Monongalia (Districts 2, 13 and 14) was split into three pieces, Marion County (Districts 2 and 3) in two, yet each county is a community of interest.

In rural Wayne County, all or parts of 9 precincts were peeled off and added to suburban Cabell County. When all of rural Roane County was proposed to be added to Kanawha,[2] the legislature turned down the proposal, although it served the goal of keeping senate districts bounded by county lines, because it would mean Kanawha County would be represented by a Roane Countian. In the course of its failure to consistently follow the state constitution, the legislature diluted the votes of 43% of its residents.

One may surmise that not much remains of the *Mahan/Thomson* requirements if the reasons cited by West Virginia constitute a consistent application of a rational state policy sufficient to partially disenfranchise 43% of the state's citizens.

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[2] *See* Plan 28e5, App. 71.

The District Court directly addressed the "uncanny" problem presented by Kanawha at App. 10. In its discussion, the Court explained that the treatment given Kanawha County serves all the goals stated in the legislation. The difficulty with this approach is that this is a *statewide* reapportionment. The issue is whether the goals were served throughout the state. In order to justify the statewide population imbalances, West Virginia bore the burden of showing that "the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy . . . . " *Mahan*, quoting *Reynolds v. Sims*, 377 U.S. 533, at 577.

The standard applied by the District Court in this case appears to be: was there a good reason for treating Kanawha County differently? Appellants submit that no equal protection violation could ever be found using this standard, because it presumes unequal treatment. If Cabell County's 96,000 residents may be represented by a Wayne Countian, then Kanawha Countians may be represented by a Roane Countian. Kanawha County's interests and problems are no more "uncanny" than those of the rest of the state. They were simply paid greater deference by the District Court. This unequal, inconsistent treatment cannot justify equal protection violations.

The reasons listed by the legislature were not consistently applied across West Virginia. The Eastern Panhandle is underrepresented not because the reasons were applied, but because they were largely ignored outside Kanawha County.

Virginia and Wyoming overcame population imbalances greater than those in this case by providing proof of long adherence to rational state policies. Because West Virginia has no such proof, this plan is violative of equal protection.

Had the District Court applied the standards in *Mahan* and *Thomson* properly, the plan would have been found to violate equal protection. The Appellants respectfully request that this Court note probable jurisdiction.

CONCLUSION

The reasons put forth by West Virginia to justify diluting the votes of 43% of its population are insufficient to comply with equal protection requirements. The "rational state policies" set forth in the statute and the state constitution were largely ignored except when they served the goal of keeping Kanawha County intact and its four senators in office. Very little remains of *Mahan v. Howell*, 410 U.S. 315 (1973) or *Brown v. Thomson*, 462 U.S. 835 (1983) if a scheme so clearly designed to protect one county's power at the expense of the voting rights of the

rest of the state's population can be justified. This Court should note probable jurisdiction.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

J. FRANK DEEM, ELIAS DON YOAK, and KENNETH YUFER,

Plaintiffs,

RICK HANDLEY, PHYLLIS ARTHUR, and BOB BAIRD, individually and in their official capacity as the County Commissioners of Mason County, West Virginia,

Intervening Plaintiffs,

v.

CIVIL ACTION
NO. 3:01cv75

JOSEPH MANCHIN, III, Secretary of State of West Virginia, BOB WISE, Governor of the State of West Virginia, EARL RAY TOMBLIN, President of the Senate of West Virginia, and ROBERT S. KISS, Speaker of the House of Delegates of the State of West Virginia, in their official capacities,

Defendants.

JOHN UNGER, II, JOHN OVERINGTON, ELIZABETH BLAKE, GREGORY CORLISS, JERRY M. MAYS, KENNETH MAYS, BILL MOORE, SHIRLEY MOORE, CLARENCE PENNINGTON, WILLIAM C. RITCHIE, and PHILIP SPRIGGS,

Plaintiffs,

RICK HANDLY, PHYLLIS ARTHUR, and BOB BAIRD, individually and in their official capacity as the County Commissioners of Mason County, West Virginia,

Intervening Plaintiffs,

v.

CIVIL ACTIOIN NO. 3:01cv78

JOSEPH MANCHIN, III, Secretary of State of West Virginia, BOB WISE, Governor of the State of West Virginia, EARL RAY TOMBLIN, President of the Senate of West Virginia, and ROBERT S. KISS, Speaker of the House of Delegates of the State of West Virginia, in their official capacities,

Defendants.

Before MICHAEL, Circuit Judge, and FABER and BROADWATER, District Judges.

FABER, District Judge.

AMENDED MEMORANDUM OPINION

On September 19, 2001, the West Virginia Legislature enacted House Bill 511 which redistricted both chambers of the legislature based on the United States census of 2000. Two suits were filed challenging the constitutionality of the redistricting plan as it relates to the West Virginia Senate. The two suits were consolidated and this

three-judge court appointed to hear them pursuant to 28 U.S.C. § 2284. Plaintiffs in the first suit include John Unger, II, a West Virginia State Senator, and John Overington, a member of the House of Delegates. Both are residents of Berkeley County, in what is commonly referred to as West Virginia's "Eastern Panhandle." One of the plaintiffs in the second case is J. Frank Deem, a member of the West Virginia Senate from Wood County, which borders the Ohio River in the West. Unger is a Democrat; Deem and Overington are Republicans. Both suits are based on the proposition that there are impermissible population variances among the districts of the State Senate under House Bill 511. Federal jurisdiction is grounded on 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

After the two original suits were filed and consolidated, this court permitted a third group of plaintiffs to intervene under Rule 24 of the Federal Rules of Civil Procedure. These new plaintiffs are Rick Handley, Phyllis Arthur and Bob Baird, the elected members of the County Commission of Mason County, West Virginia. Handley and Arthur are Democrats; Baird is a Republican. The three commissioners contend that House Bill 511, as it redistricted the West Virginia House of Delegates, violates the "three-fifths rule" contained in Article VI, § 6 of the West Virginia Constitution. Article VI, § 6 requires a county containing less than three-fifths of the ratio of representation for the House of Delegates to be attached to some contiguous county or counties to form a delegate district. Mason County is more populous than three-fifths of the delegate ratio, but is denied a delegate, the intervenors contend, because it is split into two districts containing other counties which are more populous. The

intervenors maintain that this court has supplemental jurisdiction over their state constitutional claim under 28 U.S.C. § 1367.

The material facts are not in dispute and the cases are ripe for decision on cross-motions for summary judgment. For the reasons discussed below, we find no constitutional defect in the redistricting plan as it relates to the West Virginia Senate, and we dismiss for want of jurisdiction the intervenors' attack on the plan as it relates to the House of Delegates.

I.

According to the 2000 census the population of West Virginia is 1,808,344. The State Senate comprises seventeen senatorial districts. Under ideal population equality, each district would contain 106,374 people. West Virginia's most populous county, Kanawha, is given two districts which are coterminous. These two districts, District 8 and District 17, together contain 200,073 people, the total population of Kanawha County. Thus, each district has a population of 100,036.5 persons, 6,337.5 fewer persons than the ideal, a deviation of 5.96%.

Before 1965, Kanawha County had one Senate district and two Senators, causing its citizens to be grossly underrepresented in the State Senate. In 1965, Kanawha County was given four Senators in two overlapping county-wide districts. The legislature has adhered to this pattern in every redistricting since, despite the fact that Kanawha's population has been in decline throughout the entire period. In 1970, Kanawha County had 13.16% of the state's total population, in 1980 it had 11.87%, in 1990,

11.58% and in 2000, 11.06%. The West Virginia Senate has 34 members; four senators are 11.76% of the total membership. Kanawha's population decline has occurred at the same time that counties in West Virginia's "Eastern Panhandle" and Putnam County, which borders Kanawha on the West, have experienced significant population growth, a trend which appears to be continuing.

Senate District 4 has the largest population of any district under House Bill 511, 111,652 persons. This exceeds the ideal population by 5,278, a deviation of 4.96%. To calculate the maximum deviation under the plan, the absolute deviation of the least populous district (District 8 or District 17) is added to the absolute deviation of the most populous district (District 4). The sum of these two numbers, 5.96 and 4.96, is 10.92. The maximum deviation under the plan is therefore 10.92%.

Under the plan the average Senate district deviates from the ideal population by 3.92%. District 15 has a population of 111,344, or 4,970 more than the ideal population. District 15's deviation is 4.67% and, when added to the deviation of District 8 or District 17, produces a maximum deviation of 10.63%. Any of six different districts, the 3rd, 4th, 11th, 14th, 15th or 16th, can be used with Kanawha County to produce a maximum deviation greater than 10%. The total population of these six districts is 668,046.

House Bill 511 divides eleven counties and twelve voting districts among different Senate districts. Such division directly contravenes Article VI, § 4 of the West Virginia Constitution which requires Senate districts to be "bounded by county lines." Beginning with the 1977

reapportionment, and in each one since, however, the legislature has found and declared that it is not possible to comply with this requirement and, at the same time, meet the "one person – one vote" mandate of *Reynolds v. Sims*, 377 U.S. 533 (1964).

II.

Summary judgment is appropriate in those cases in which there is no genuine dispute of a material fact, and in which it appears that the moving party is entitled to judgment as a matter of law. *See Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 214 (4th Cir. 1993) Summary judgment should be granted in those cases in which it appears that no genuine issue of material fact remains unresolved and further inquiry into the facts is unnecessary to clarify the application of the law. *See id.* A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) In making this determination, the court draws all permissible inferences from the underlying facts in the light most favorable to the party opposing the motion. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Contra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991). Summary judgment for a defendant is appropriate when a plaintiff "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III.

We begin our analysis by observing that there is a strong policy of deference to state legislatures in devising redistricting plans. Redistricting and reapportioning legislative bodies is a legislative task which federal courts should make every effort not to preempt. *See Wise v. Lipscomb*, 437 U.S. 535 (1978). State policies and state preferences are for a state's elected representatives to decide; federal judges should not interfere unless those policies or preferences directly violate the United States Constitution. *See White v. Weiser*, 412 U.S. 783 (1973).

Before 1962, state legislative redistricting issues were thought to be political questions which were nonjusticiable. See *Colegrove v. Green*, 328 U.S. 549 (1946). All this changed with *Baker v. Carr*, 369 U.S. 186 (1962), which held that the federal courts were required to take jurisdiction over a suit challenging apportionment of the Tennessee General Assembly.

Modern federal constitutional law establishing standards for state redistricting begins with *Reynolds v. Sims*, 377 U.S. 533 (1964). That case was a challenge to malapportionment of the Alabama legislature. Although the state constitution required a reapportionment every ten years based on population, the Alabama districts continued to be based on the 1900 census. The United States Supreme Court held the old apportionment to violate equal protection in view of substantial population shifts which had taken place since 1900. Equal protection, the Court said, "requires that a State make an honest and good faith effort to construct districts, in both houses of

its legislature, as nearly of equal population as is practicable." *Id.* at 577. The Court recognized, however, that "mathematical exactness or precision is hardly a workable constitutional requirement." *Id.* Divergences from a strict population standard were deemed permissible if "based on legitimate considerations incident to the effectuation of a rational state policy. . . . " *Id.* at 579.

In *Brown v. Thomson,* 462 U.S. 835 (1983), the Supreme Court established some guidelines for courts to follow in examining state legislative apportionments. Under *Thomson,* if the maximum population deviation of a plan is less than 10%, the plan *prima facie* non-discriminatory. On the other hand, if the deviation exceeds 10%, the plan is *prima facie* violative of equal protection, and the burden shifts to the state to show that the plan "may reasonably be said to advance" consistently applied, rational and legitimate state policies. *Mahan v. Howell,* 410 U.S. 315, 328 (1973). The degree of disparity determines the magnitude of the state's burden. The showing required to justify population deviations is flexible – the greater the deviation, the heavier the burden. See *Karcher v. Daggett,* 462 U.S. 725 (1983). In the instant case, the maximum deviation above 10% is slight, only 0.92%. Stated another way, Kanawha, the county with the fewest people per Senator, has 11.06% of the state's population and 11.76% of its Senators.

House Bill 511 enumerates the policy interests the Legislature attempted to serve in the redistricting plan. The Bill reads, in pertinent part, as follows:

> [T]he Legislature, in dividing the state into senatorial districts, as described and constituted in subsection (d) of this section has: (1) Adhered to the equality of population concept, while at the

> same time recognizing that from the formation of this state in the year one thousand eight hundred sixty-three, each constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of government have been implemented along political subdivision lines; (2) Made the senatorial districts as compact as possible, consistent with the equality of population concept; (3) Formed the senatorial districts of "contiguous territory" as that term has been construed and applied by the West Virginia supreme court of appeals; (4) Deviated from the long-established state policy, recognized in subdivision (1) above, by crossing county lines only when necessary to ensure that all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population; and (5) Also taken into account in crossing county lines, to the extent feasible, the community of interests of the people involved.

The policy interests thus identified in the bill are five, which may be summarized as follows: (1) Recognizing established political subdivision lines; (2) making the senatorial districts as compact as possible, consistent with equality of population; (3) forming each district of contiguous territory; (4) maintaining community of interests involved; and (5) crossing county lines only when necessary to preserve the other stated goals.

The defendants have offered several other policies to support the plan, such as preserving the core of pre-

existing districts. In this case, however, we need only consider the policies specifically identified in the bill on the premise that the bill itself is the most reliable source of legislative intent. This was the procedure followed by the Supreme Court in *Mahan*, where the Court had before it a similar statement of purpose in the plan under consideration there.[1]

It is obvious that the policy goals of the redistricting plan identified in House Bill 511 will not always be consistent. In some circumstances they will compete. The redistricting exercise is therefore a balancing process in which one objective must sometimes yield to serve another. This is an exercise peculiarly suited to the give and take of the legislative process. Courts, as a consequence, should be reluctant to substitute their judgment for the legislature's choices.

The West Virginia Legislature was presented with an uncanny problem when it came to Kanawha County, a problem aggravated by a special provision of the West Virginia Constitution. Article VI, § 4 of that Constitution gives each district two Senators, but requires that in the

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[1] The plaintiffs in at least one of the cases have objected strenuously to an order of the court denying them the privilege of taking depositions of the Legislative Redistricting staff. The stated purpose of the deposition was to challenge the legislative finding in House Bill 511 that it is not possible to divide the state into senatorial districts which achieve equality of population as nearly as possible and at the same time to adhere to the mandates of Article VI, Section 4 of the West Virginia Constitution. We do not view such an exercise as helpful. We take at face value the objectives of the plan as stated in the bill itself.

case of multi-county districts, the two come from different counties. Creating one district in Kanawha County of ideal size (106,374 people) would leave the balance of Kanawha's population (93,699) to be combined with another county. That other county would contribute only about 12,000 people to the combined district, but would be entitled to its own resident Senator. Avoiding such a result appears to us to be a rational legislative choice. This is particularly the case when one considers the rural nature of counties contiguous to Kanawha, such as Roane or Clay, which are small enough to contribute the correct number of people to the combined district without splitting them up. Another alternative which suggests itself may be even less desirable – dividing Kanawha into pieces and creating several combined districts by adding the pieces to a number of adjoining counties.

Keeping Kanawha County intact serves all of the Legislature's stated goals. It preserves the territorial integrity of Kanawha County, an established political subdivision; it creates two compact districts which are formed of contiguous territory; it maintains Kanawha County's community of interests, which differs substantially from the interests of adjoining counties; and, finally, the districts do not cross county lines at all. The plan serves all of these goals while creating a deviation only slightly above 10%. We cannot, in light of this, say that the legislature's policy decisions were irrational.

This conclusion finds support in reported cases upholding other redistricting plans. In *Mahan*, the Supreme Court held that maintaining the integrity of a traditional county and municipal boundaries in reapportionment of the Virginia House of Delegates justified a

deviation of 16.4% from the ideal district size. 410 U.S. 315, 328 (1973). In *Voinovich v Quilter*, 507 U.S. 146 (1993), the United States Supreme Court reversed a district court decision disapproving Ohio reapportionment. The Supreme Court instructed the lower court to consider on remand whether a policy of preserving political subdivision boundaries justified size deviations among districts in excess of 10%. *See id.* at 162. Another case, *Stone v. Heckler*, 782 F. Supp. 1116 (N.D.W. Va. 1992), concerned a challenge to a West Virginia congressional redistricting plan based on the 1990 census. In that case, this court concluded that population variances were justified in order to preserve the cores of preexisting districts and to maintain district compactness. *See id.* at 1129.

We recognize that, in order to pass constitutional muster, the legislative policy offered to support a deviation in excess of 10% must be consistently applied. Here, we have some concerns about House Bill 511, but our concerns do not compel us to invalidate the plan. There are two or three instances in which the plan rather cavalierly violates the objective of crossing county lines only when necessary to preserve other stated goals. For example, five voting districts of Ohio County are severed from the First Senatorial District, which contains the bulk of that county, and are added to the Second Senatorial District. The necessity for this is difficult to perceive. Moreover, although the plan generally serves to advance the goal of community interests within each district, there are instances in which this principle is also violated. For example, the Fifteenth Senatorial District comprises the southern portion of quickly growing Berkeley County as

well as Pocahontas County, two areas culturally distinct and separated by a driving distance of over 200 miles.

Despite our concerns, we are constrained to uphold the plan. Our inquiry is limited to whether *this* plan meets the constitutional requirements. Our quest is not to find the best plan, but rather to assess the constitutionality of the plan the legislature has chosen. Here, the deviation from the ideal exceeds only slightly 10%. The legislature has adopted five rational and legitimate policy goals to justify a deviation in excess of 10%. In many respects these goals are competing and must be balanced by the legislature. We cannot conclude from the facts of this case that, in this balancing process, the legislature has failed to meet the requirement that the policies be consistently applied. Accordingly, we hold that House Bill 511, as it relates to the West Virginia Senate, is constitutional.

IV.

We turn now to the intervenors' claim that House Bill 511 is invalid as it relates to reapportionment of the House of Delegates. Intervening plaintiffs, who are Mason County Commissioners, claim that the House of Delegates portion of House Bill 511 (hereinafter the "House section") violates Article VI, § 6 of the Constitution of the State of West Virginia. In their motion for summary judgment, the intervenors claim that their case is factually interrelated to the cases challenging reapportionment of the Senate.

The court must determine first whether it has jurisdiction to hear the intervenors' claim. Federal courts are

empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant of Congress. The intervenors contend that this court has supplemental jurisdiction over their claim under 28 U.S.C. § 1367. Section 1367 provides that:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). The court has original jurisdiction over the Senate claims because those plaintiffs allege that the Senate section violates the Fourteenth Amendment to the Constitution as interpreted by the United States Supreme Court. The issue, then, is whether the intervenors' claim that the House section violates the West Virginia Constitution constitutes the same case or controversy as the cases of the original plaintiffs.

The test for determining whether state and federal claims form part of the same constitutional case or controversy is set forth in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). Pendent jurisdiction, in the sense of judicial power, exists whenever there is a federal claim, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of

operative fact. But if considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. Accord, *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 628 (4th Cir. 1997).

In support of the factual interdependence of this petition with the original Senate complaints, the intervenors argue that: (a) the parties are identical in the two actions; and (b) both parties seek to have House Bill 511 declared invalid. The fact that the parties are identical does not by itself establish that the two cases are factually related. Thus, the intervenors' claim must be dismissed unless the two sections of House Bill 511 have sufficiently similar underlying facts.[2]

Legally, the claims are completely distinct. The challenge to Senate redistricting is based on inequality of population under the equal protection clause of the United States Constitution. The House complaint is based solely on a specific and unique provision of the West Virginia Constitution regarding the arrangement of counties in House of Delegates redistricting.

The only relevant facts common to both claims are the populations and boundaries of the counties of West Virginia. However, none of these facts are in dispute. The

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[2] The fact that the two sections are within the same bill is of little importance. Under West Virginia's general severability statute, W. Va. Code § 2-2-10(cc), the House section does not rise and fall with the Senate section.

intervenors' challenge to the constitutionality of the House section of House Bill 511 is completely separate from the challenge to the Senate section. The House section deals with the relative populations and boundary lines of the 100 Delegate districts. The Senate section deals with the relative populations and boundary lines of the 17 Senate districts. The House section does not arise out of a common nucleus of operative fact with the Senate section and challenges a different section of the statute based on entirely different legal principles. Accordingly, this court lacks subject matter jurisdiction over the petition regarding the redistricting of the House of Delegates and declines to consider the merits of the intervenors' complaint.

A separate Judgment Order will be entered consistent with this Memorandum Opinion.

JUDGMENT ORDER

For the reasons discussed in the court's Memorandum Opinion filed today, it is ORDERED as follows:

1. The motion of plaintiffs, J. Frank Deem, et al., for summary judgment filed on December 6, 2001, is DENIED.

2. The motion of plaintiffs, John Unger, II, et al., for summary judgment filed on December 6, 2001, is DENIED.

3. The motion of defendants, Earl Ray Tomblin, et al., for summary judgment filed on December 6, 2001, is GRANTED.

4. The complaint of intervening plaintiffs, Rick Handley, et al., filed on November 30, 2001, is DISMISSED for lack of jurisdiction.

5. All other pending motions are DENIED as moot.

6. These consolidated actions are DISMISSED from the docket. As to intervening plaintiffs, Rick Handley, Phyllis Arthur and Bob Baird, dismissal is without prejudice; as to all other plaintiffs, dismissal is with prejudice.

7. The Clerk is directed to retire these cases from the docket and to mail certified copies of the Judgment order and copies of the court's Memorandum opinion to counsel of record.

It is SO ORDERED this 27th day of December, 2001.

/s/ M. Blane Michael
M. BLANE MICHAEL

/s/ David A. Faber
DAVID A. FABER

/s/ W. Craig Broadwater
W. CRAIG BROADWATER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA AT MARTINSBURG

JOHN UNGER, II, et al.,

Plaintiffs,

v.

JOSEPH MANCHIN, III, et al.,

Defendants.

CIVIL ACTION
NO. 3:01-0075

ORDER

Before the court is plaintiffs' emergency motion to compel full and complete answers from three members of the "redistricting staff" and to require defendant West Virginia Senate President Earl Ray Tomblin to appear for his deposition. For the reasons stated herein, plaintiffs' motion is DENIED.

During a telephonic conference conducted on December 3, 2001, plaintiffs' counsel withdrew their motion to compel Senator Tomblin's deposition. This portion of plaintiffs' motion is, therefore, DENIED as MOOT.

The court then proceeded to hear arguments from the parties with regard to the depositions of the redistricting staff. The court concluded that allowing these deposition to proceed at this time was not in compliance with this court's Scheduling Order entered November 21, 2001, directing the parties to "meet promptly and identify any and all material facts which can be agreed upon or stipulated." The court noted that identification of disputed facts is the first step toward an expedited resolution of this matter, and that the depositions might be permitted

should the court determine such action is desirable. For these reasons, the court DENIED plaintiffs' motion to compel as to the redistricting staff.

The Clerk is directed to mail and FAX copies of this order to all counsel of record, United States Circuit Judge M. Blane Michael and United States District Judge W. Craig Broadwater.

Dated this 3rd day of December, 2001.

ENTER:

/s/ David A. Faber
David A. Faber
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

J. FRANK DEEM, ELIAS DON YOAK, and KENNETH YUFER,

Plaintiffs,

RICK HANDLEY, PHYLLIS ARTHUR, and BOB BAIRD, individually and in their official capacity as the County Commissioners of Mason County, West Virginia,

Intervening Plaintiffs,

v.

CIVIL ACTION NO. 3:01cv75

JOSEPH MANCHIN, III, Secretary of State of West Virginia, BOB WISE, Governor of the State of West Virginia, EARL RAY TOMBLIN, President of the Senate of West Virginia, and ROBERT S. KISS, Speaker of the House of Delegates of the State of West Virginia, in their official capacities,

Defendants

JOHN UNGER, II, JOHN OVERINGTON, ELIZABETH BLAKE, GREGORY CORLISS, JERRY M. MAYS, KENNETH MAYS, BILL MOORE, SHIRLEY MOORE, CLARENCE PENNINGTON, WILLIAM C. RITCHIE, and PHILIP SPRIGGS,

Plaintiffs,

RICK HANDLY, PHYLLIS ARTHUR, and BOB BAIRD, individually and in their official capacity as the County Commissioners of Mason County, West Virginia,

Intervening Plaintiffs,

v.

CIVIL ACTION NO. 3:01cv78

JOSEPH MANCHIN, III, Secretary of State of West Virginia, BOB WISE, Governor of the State of West Virginia, EARL RAY TOMBLIN, President of the Senate of West Virginia, and ROBERT S. KISS, Speaker of the House of Delegates of the State of West Virginia, in their official capacities,

Defendants.

NOTICE OF APPEAL

(Filed Feb. 25, 2002)

Notice is hereby given that, JOHN UNGER, II, JOHN OVERINGTON, ELIZABETH BLAKE, GREGORY CORLISS, JERRY M. MAYS, KENNETH MAYS, BILL MOORE, SHIRLEY MOORE, CLARENCE PENNINGTON, WILLIAM C. RITCHIE, and PHILIP SPRIGGS (Plaintiffs) in the above named case hereby appeal to the United States Supreme Court the final judgment entered in this action

on the 27th day of December, 2001, Plaintiffs appeal pursuant to 28 U.S.C. §1253.

/s/ Lawrence M. Schultz
Lawrence M. Schultz
BURKE, SCHULTZ,
HARMAN & JENKINSON
P.O. Box 1938
Martinsburg, WV 25401
Attorney for Plaintiffs

ENROLLED

H. B. 511

(By Mr. Speaker, Mr. Kiss, and Delegates Staton, Varner, Pino, Givens, Doyle and Stalnaker)

[Passed September 19, 2001; in effect from passage.]

AN ACT to amend and reenact sections one, two and two-b, article two, chapter one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to apportionment of membership of the Senate; apportionment of membership of the House of Delegates; requiring all actions necessary and related to such apportionment; and defining terms.

Be it enacted by the Legislature of West Virginia:

That sections one, two and two-b, article two, chapter one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 2. APPORTIONMENT OF REPRESENTATION.

§1-2-1. Senatorial districts.

(a) This section shall be known and may be cited as the "Senate Redistricting Act of 2001".

(b) As used in this section:

(1) "County" means the territory comprising a county of this state as such county existed on the first day of January, two thousand, notwithstanding any boundary changes thereof made subsequent thereto;

(2) "Block" and "voting district" mean those geographic areas as defined by the bureau of the census of the United States department of commerce for the taking of the two thousand census of population and described on census maps prepared by the bureau of the census. Such maps are, at the time of this enactment, maintained by the bureau of the census and filed in the office of legislative services;

(3) "Incumbent senator" means a senator elected at the general election held in the year two thousand or at any general election thereafter, with an unexpired term of at least two years in duration.

(c) The Legislature recognizes that in dividing the state into senatorial districts, the Legislature is bound not only by the United States constitution but also by the West Virginia constitution; that in any instance where the West Virginia constitution conflicts with the United States constitution, the United States constitution must govern and control, as recognized in section one, article one of the West Virginia constitution; that the United States constitution, as interpreted by the United States supreme court and other federal courts, requires state legislatures to be apportioned so as to achieve equality of population as near as is practicable, population disparities being permissible where justified by rational state policies; and that the West Virginia constitution requires two senators to be elected from each senatorial district for terms of four years each, one such senator being elected every two years, with one half of the senators being elected biennially, and requires senatorial districts to be compact, formed of contiguous territory and bounded by county lines. The Legislature finds and declares that it is not

possible to divide the state into senatorial district so as to achieve equality of population as near as is practicable as required by the United States supreme court and other federal courts and at the same time adhere to all of these provisions of the West Virginia constitution; but that, in an effort to adhere as closely as possible to all of these provisions of the West Virginia constitution, the Legislature, in dividing the state into senatorial districts, as described and constituted in subsection (d) of this section, has:

(1) Adhered to the equality of population concept, while at the same time recognizing that from the formation of this state in the year one thousand eight hundred sixty-three, each constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of government have been implemented along political subdivision lines;

(2) Made the senatorial districts as compact as possible, consistent with the equality of population concept;

(3) Formed the senatorial districts of "contiguous territory" as that term has been construed and applied by the West Virginia supreme court of appeals;

(4) Deviated from the long-established state policy, recognized in subdivision (1) above, by crossing county lines only when necessary to ensure that all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population; and

(5) Also taken into account in crossing county lines, to the extent feasible, the community of interests of the people involved.

(d) The Senate shall be composed of thirty-four senators, one senator to be elected at the general election to be held in the year two-thousand two, and biennially thereafter for a four-year term from each of the senatorial districts hereinafter in this subsection described and constituted as follows:

(1) The counties of Brooke, Hancock and voting districts 1, 4, 5, 10, 11, 12, 13, 14, 16, 20, 23, 24, 28, 29, 31, 36, 49, 77, 103, 104, 107, 108, 113, 115, 116, 119, 120, 122, 124, 125, 127, 128, 129, 130, 131, 135, 137, 141, 143, 146, 148, 158, 161 of Ohio shall constitute the first senatorial district;

(2) The counties of Calhoun, Doddridge, Marshall, Ritchie, Tyler, Wetzel and voting districts 59, 66, 67, 68, 69, 70, 72, 74, 78 of Marion and voting districts 40, 41, 42, 44, 47, 51, 52, 53, 54, 55, 58, 67, block: 0113001033, 68, block: 0113002014 of Monongalia and voting districts 60, 64, 69, 100, 102 of Ohio shall constitute the second senatorial district;

(3) The counties of Pleasants, Wirt, Wood and voting districts 4, 5, 7, 10, 15, 16, 22, blocks: 9629003000, 9629003002, 9629003003, 9629003005, 9629003006, 9629003014, 9629003015, 9629003016, 9629003017, 9629003018, 9629003019, 9629003020, 9629003022, 9629003025, 9629003029, 9629003030, 9629003031, 9629003032, 9629003033, 9629003034, 9629003035, 9629003036, 9629003037, 9629003038, 9629003039, 9629003040, 9629003999, 9629004000, 9629004001,

9629004002, 9629004003, 9629004004, 9629004005, 9629004006, 9629004007, 9629004008, 9629004009, 9629004010, 9629004014, 9629004015, 9629004016, 9631001012, 25, 28, 29, 30, 32 of Roane shall constitute the third senatorial district;

(4) The counties of Jackson, Mason, Putnam and voting districts 1, 11, 12, 18, 19, 20, 21, 22, blocks: 9629001071, 9629003007, 9629003008, 9629003009, 9629003010, 9629003011, 9629003012, 9629003023, 9629003024, 9629003046, 9629003048, 9629003057, 9629003058, 9629003059, 9630004018, 9630004019, 9630004020, 9630004021, 9630004040, 9630004042, 23 of Roane shall constitute the fourth senatorial district;

(5) The county of Cabell and voting districts 11, 12, blocks: 0203001000, 0203001011, 0203002001, 0203002041, 0203006000, 0203006002, 0203006003, 0203006004, 0203006005, 0203006006, 0203006007, 0203006008, 0203006009, 0203006010, 0203006011, 0203006012, 0203006013, 0203006021, 0203006024, 0203006033, 0203006034, 0203006040, 0203006041, 0203006042, 0203006043, 0203006044, 0203006045, 0203006046, 0203006048, 0203006049, 0203006050, 0203006051, 0203006052, 0203006053, 0203006054, 0203006055, 0203006056, 0203006057, 0203006063, 0203006064, 0203006998, 0203006999, 16, blocks: 0204001009, 0204001013, 56, 59, 60, 61, 62, blocks: 0052002000, 0052002001, 0052002002, 0052002010, 0052002011, 0052002012, 0052002032, 0201002002, 0201002003, 0201002011 and 63 of Wayne shall constitute the fifth senatorial district;

(6) The counties of McDowell and voting districts 2, 3, 4, 5, 42, 46, 49, 51, 52, 53, 54, 55, 57, blocks: 9509001025, 9509001026, 9511002003, 9511002004, 9511002005, 9511002024, 9511002025, 58, 60, 61, 62, 66, 67, 68, 69, 71, 72, 79, 96 of Mercer, Mingo and voting districts 1, 3, 5, 6, 12, blocks: 0203001001, 0203006001, 0203006997, 13, 14, 16, blocks: 0203002026, 0203002027, 0203002028, 0203002029, 0203002030, 0203002031, 0203002032, 0203002040, 0203002996, 0203003006, 0204001010, 0204001011, 0204001012, 0204001014, 0204001015, 0204001016, 0204001017, 0204001034, 0204001054, 0204001055, 0204001056, 0204001057, 0204001058, 0204001059, 0204001060, 0204001061, 0204001062, 0204001996, 17, 18, 20, 21, 31, 34, 36, 37, 38, 62, blocks: 0201002000, 0201002001, 0201002004, 0201002005, 0201002006, 0201002007, 0201002008, 0201002009, 0201002010, 0201002012, 0201002013, 0201002014, 0201002015, 0201002016, 0201002018, 0204003008, 0204003009, 0204003010, 0204003011, 0204003012, 0204003013, 0204003014, 0204003015, 0204003016, 0204003017, 0204003021 of Wayne and voting districts 5, 10, 11, 23, 24 and 25 of Wyoming shall constitute the sixth senatorial district;

(7) The counties of Boone, Lincoln, Logan and voting districts 19, 22, 30, 41, 42, 45, 48, 50, 51, 52, 53, 54 and 57 of Wayne shall constitute the seventh senatorial district;

(8) The county of Kanawha shall constitute the eighth senatorial district;

(9) The county of Raleigh and voting districts 1, 2, 4, 6, 7, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29,

30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 44, 45, 47, 48 and 99 of Wyoming shall constitute the ninth senatorial district;

(10) The counties of Monroe, Summers, Greenbrier, voting districts 68 and 72 of Fayette, voting districts 1, 14, 15, 20, 27, 28, 30, 31, 32, 33, 34, 36, 37, 38, 44, 47, 48, 56, 57, blocks: 9511002006, 9511002007, 9511002008, 9511002009, 9511002010, 9511002011, 9511002012, 9511002013, 9511002014, 9511002015, 9511002016, 9511002017, 9511002018, 9511002019, 9511002020, 9511002021, 9511002022, 9511002023, 9511002026, 9511002027, 9511002028, 9511003003, 9511003004, 9511003005, 9511003007, 9511003008, 9511003009, 9511003010, 9511003011, 9511003012, 9511003013, 9511003014, 9511003015, 9511003016, 9511003017, 9511003018, 9511003019, 9511003020, 9511003021, 59, 64, 65, 73, 74, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 95 and 98 of Mercer shall constitute the tenth senatorial district;

(11) The counties of Clay, Nicholas, Webster, voting districts 1, 4, 5, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 23, 24, 26, 28, 29, 31, 32, 37, 38, 41, 42, 45, 46, 47, 51, 52, 53, 55, 56, 58, 59, 60, 65, 67, 74 of Fayette and voting districts 4, 6, 7, 8, 9, 12, 13, 14, 15, 16, 18, 19, 20, 25, 27, 35, 38, 42, 44 and 47 of Upshur shall constitute the eleventh senatorial district;

(12) The counties of Braxton, Gilmer, Harrison and Lewis; shall constitute the twelfth senatorial district;

(13) The voting districts 1, 2, 5, 6, 7, 13, 16, 18, 20, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 40, 41, 42, 43, 44, 45, 47, 48, 50, 51, 52, 53, 55, 56, 57, 58, 61, 62, 82, 83, 86, 87, 88, 89, 90, 92, 96, 98, 100, 101, 102, 104, 112, 113, 114, 115, 116,

117, 118, 120, 121, 122, 123, 124 and 125 of Marion and voting district 1, blocks: 0110001008, 0110001019, 0110001020, 0110001021, 0110001022, 0110001023, 0110001024, 0110001025, 0110001027, 0110001029, 0110001030, 0110001031, 0110001032, 0110001033, 0110001034, 0110001999, 0110002005, 0110002007, 0110002008, 0110002009, 0110002041, 0110002048, 0110002049, 0110002050, 0110002051, 0110002052, 0110002053, 0110002054, 0110002999, 0110003003, 0110003004, 0110003009, 0110003011, 0110003012, 0110003018, 0110003019, 0110003999, voting districts 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 35, 36A, 36B, 39, 46, 48, 49, 56, 64, 67, blocks: 0113001008, 0113001009, 0113001010, 0113001011, 0113001012, 0113001013, 0113001014, 0113001015, 0113001016, 0113001017, 0113001018, 0113001019, 0113001020, 0113001021, 0113001022, 0113001023, 0113001024, 0113001025, 0113001026, 0113001027, 0113001028, 0113001029, 0113001030, 0113001032, 0113001034, 0113001035, 0113001036, 0113001999, 0113003013, 0113003014, 0113003015, 0113003016, 0113003017, 0113003018, 0113003019, 0113003020, 0113003021, 0113003022, 0113003024, 0113003025, 0113003026, 0113003027, 0113003028, 0113003029, 68, blocks: 0113001000 0113001001, 0113001002, 0113001003, 0113001004, 0113001005, 0113001031, 0113002002, 0113002003, 0113002004, 0113002005, 0113002006, 0113002007, 0113002008, 0113002009, 0113002010, 0113002011, 0113002012, 0113002013, 0113002015, 0113002016, 0113002017, 0113002018, 0113002019, 0113002020, 0113002021, 0113002022, 0113002023, 0113002024, 0113002025, 69, 70,

71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, blocks: 0109022036, 0109022048, 0110002040, 0110002044, 0110003000, 0110003005, 86, 87, 88, 90, 91 and 92 of Monongalia shall constitute the thirteenth senatorial district;

(14) The counties of Mineral, Preston, Taylor, Tucker, Barbour and voting districts 8, 9, 10, 14 and 15 of Grant and voting district 1, blocks: 0110002042, 0110002045, 0110002047, 0110003007, 0110003008, 0110003010, 0110003013, 0110003017, 0110003020, 0110003998, 33, 34, 37, 38, 59, 60, 61, 62, 63, 85, blocks: 0109022035, 0109022037, 0109022047, 0109022062, 0109022064, 0109022065, 0110002043, 0110002046, 0110003001, 0110003002, 0110003006, 0110003014, 0110003015, 0110003016, 0110003021, 0110003022, 0110003023, 0110003024, 0110003025, 0110003026, 0110003027, 0110003028, 0110003029, 0110003996, 0110003997, 0118022007, 0118025003, 0118025006, 0118025007 and 0118025008 of Monongalia shall constitute the fourteenth senatorial district;

(15) The counties of Hampshire, Hardy, Morgan, Pendleton, Pocahontas, Randolph and voting district 22, blocks: 9712006072, 9712006073, 9712006074, 9712006075, 9719002004, 9719002006, 43, blocks: 9718003004, 9718003010, 9718003011, 9718003012, 9718003013, 9718003014, 9718003015, 9718003016, 9718003017, 9718003021, 9718003022, 9718003023, 9718003024, 9718003025, 9718003026, 9718003027, 9718003028, 9718003029, 9718003030, 9718003031, 45, 46, blocks: 9712006065, 9712006070, 9712006071, 9718001036, 9718001037, 9718001038, 9718001039, 9718001040, 9718001043, 9718001050, 9718001051, 47, 51, blocks:

9721003018, 9721003019, 9721003020, 9721003021, 9721003022, 9721003023, 9721003024, 9721003025, 9721003026, 9721003027, 9721003028 and 9721003029, of Berkeley, voting districts 1, 2, 3, 4, 5, 6, 7, 11, 12 and 13 of Grant and voting districts 33 and 39 of Upshur shall constitute the fifteenth senatorial district;

(16) The counties of Jefferson and voting districts 1, 2, 5, 6, 7, 8, 9, 10, 11, 14, 15, 15A, 16, 17, 18, 19, 20, 21, 22, blocks: 9712006076, 9712006077, 9716003005, 9716003006, 9717004012, 9719001010, 9719001011, 9719001012, 9719001013, 9719001014, 9719001015, 9719001016, 9719001017, 9719001018, 9719001019, 9719001020, 9719002000, 9719002001, 9719002003, 9719002007, 9719002008, 9719003024, 9719003025, 23, 24, 25, 25A, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, blocks: 9718003000, 9718003006, 9718003007, 9718003008, 9718003009, 9718003018, 9718003019, 9718003020, 44, 46, blocks: 9718001044, 9718001045, 9718001046, 9718001047, 9718001048, 9718001049, 9718001052, 9718001053, 9718001054, 9718001055, 9718003001, 9718003002, 9718003003, 48, 49, 50, 51, blocks: 9721003013, 9721003015, 9721003016, 9721004015, 9721004016, 9721004018, 9721004019, 9721004020, 9721004021, 9721004022, 9721004023, 9721004024, 9721004025, 9721004026, 9721005009, 9721005012, 9721005019 and 9721005022 of Berkeley shall constitute the sixteenth senatorial district; and

(17) The county of Kanawha shall constitute the seventeenth senatorial district.

(3) The West Virginia constitution further provides, in section four, article VI thereof, that where a senatorial

district is composed of more than one county, both senators for such district shall not be chosen from the same county, a residency dispersal provision which is clear with respect to senatorial districts which follow county lines, as required by such constitution, but which is not clear in application with respect to senatorial districts which cross county lines. However, in an effort to adhere as closely as possible to the West Virginia Constitution in this regard, the following additional provisions, in furtherance of the rationale of such residency dispersal provision and to give meaning and effect thereto, are hereby established:

(1) With respect to a senatorial district which is composed of one or more whole counties and one or more parts of another county or counties, no more than one senator shall be chosen from the same county or part of a county to represent such senatorial district;

(2) With respect to a senatorial district which does not contain any whole county but only parts of two or more counties, no more than one senator shall be chosen from the same part to represent such senatorial district; and

(3) With respect to superimposed senatorial districts which contain only one whole county, all senators shall be chosen from such county to represent such senatorial districts.

(f) Candidates for the Senate shall be nominated as provided in section, four, article five, chapter three of this code, except that such candidates shall be nominated in

accordance with the residency dispersal provisions specified in section four, article VI of the West Virginia constitution and the additional residency dispersal provisions specified in subsection (e) of this section. Candidates for the Senate shall also be elected in accordance with the residency dispersal provisions specified in said section and the additional residency dispersal provisions specified in subsection (e) of this section. In furtherance of the foregoing provisions of this subsection, no person may file a certificate of candidacy for election from a senatorial district described and constituted in subsection (d) of this section if he or she resides in the same county and the same such senatorial district wherein also resides an incumbent senator, whether the senatorial district wherein such incumbent senator resides was described and constituted by chapter eighty-five, acts of the Legislature, one thousand nine hundred ninety-three, or was described and constituted in subsection (d) of this section or its immediately prior enactment. Any vacancy in a nomination shall be filled, any appointment to fill a vacancy in the Senate shall be made and any candidates in an election to fill a vacancy in the Senate shall be chosen so as to be consistent with the residency dispersal provisions specified in section four, article VI of the West Virginia constitution and the additional residency dispersal provisions specified in subsection (e) of this section.

(g) Regardless of the changes in senatorial district boundaries made by the provisions of subsection (d) of this section, all senators elected at the general election held in the year one thousand nine hundred ninety-eight and at the general election held in the year two thousand

shall continue to hold their seats as members of the Senate for the term, and as representatives of the senatorial district, for which each thereof, respectively, was elected. Any appointment made or election held to fill a vacancy in the Senate shall be for the remainder of the term and as a representative of the senatorial district, for which the vacating senator was elected or appointed, and any such election shall be held in the district as the same was described and constituted at the time the vacating senator was elected or appointed.

(h) The secretary of state may promulgate rules and regulations to implement the provisions of this section, including emergency rules and regulations promulgated pursuant to the provisions of section five, article three, chapter twenty-nine-a of this code.

Plan Name: 1990 Moveable Senate Boundaries Base
Plan Type:

Administrator:
User: Jo

Plan Components with Population Detail Report

Friday, June 22, 2001 2:17 PM

	Total	White	Black
District 1			
County : Brooke			
Total:	25,447	24,913	216
		97.90%	0.85%
Voting Age:	20,247	19,861	170
		98.09%	0.84%
County : Hancock			
Total:	32,667	31,497	752
		96.42%	2.30%
Voting Age:	25,865	25,044	552
		96.83%	2.13%
County : Ohio (part)			
Total:	36,724	35,424	654
		96.46%	1.78%
Voting Age:	28,877	28,035	446
		97.08%	1.54%
District 1 Subtotal			
Total:	94,838	91,834	1,622
		96.83%	1.71%
Voting Age:	74,989	72,940	1,168
		97.27%	1.56%

District 2

County : Doddridge			
Total:	7,403	7,278	20
		98.31%	0.27%
Voting Age:	5,550	5,471	3
		98.58%	0.05%
County : Marion (part)			
Total:	4,443	4,379	6
		98.56%	0.14%
Voting Age:	3,419	3,373	2
		98.65%	0.06%
County : Marshall			
Total:	35,519	34,949	153
		98.40%	0.43%
Voting Age:	27,407	27,028	115
		98.62%	0.42%
County : Ohio (part)			
Total:	10,703	9,396	1,037
		87.79%	9.69%
Voting Age:	8,454	7,628	693
		90.23%	8.20%
County : Ritchie			
Total:	10,343	10,206	14
		98.68%	0.14%
Voting Age:	7,967	7,873	12
		98.82%	0.15%
County : Tyler			
Total:	9,592	9,530	2
		99.35%	0.02%
Voting Age:	7,361	7,318	1
		99.42%	0.01%

County : Wetzel			
Total:	17,693	17,502	15
		98.92%	0.08%
Voting Age:	13,489	13,365	7
		99.08%	0.05%
District 2 Subtotal			
Total:	95,696	93,240	1,247
		97.43%	1.30%
Voting Age:	73,647	72,056	833
		97.84%	1.13%
District 3			
County : Calhoun			
Total:	7,582	7,499	8
		98.91%	0.11%
Voting Age:	5,884	5,819	4
		98.90%	0.07%
County : Pleasants			
Total:	7,514	7,386	36
		98.30%	0.48%
Voting Age:	5,728	5,627	34
		98.24%	0.59%
County : Wirt			
Total:	5,873	5,788	17
		98.55%	0.29%
Voting Age:	4,381	4,321	10
		98.63%	0.23%
County : Wood			
Total:	87,986	85,627	887
		97.32%	1.01%
Voting Age:	67,758	66,181	634
		97.67%	0.94%

District 3 Subtotal

Total:	108,955	106,300	948
		97.56%	0.87%
Voting Age:	83,751	81,948	682
		97.85%	0.81%

District 4

County : Jackson

Total:	28,000	27,649	23
		98.75%	0.08%
Voting Age:	21,243	21,026	13
		98.98%	0.06%

County : Mason

Total:	25,957	25,533	130
		98.37%	0.50%
Voting Age:	20,056	19,763	84
		98.54%	0.42%

County : Putnam

Total:	51,589	50,542	287
		97.97%	0.56%
Voting Age:	38,708	38,040	183
		98.27%	0.47%

County : Roane

Total:	15,446	15,223	34
		98.56%	0.22%
Voting Age:	11,834	11,690	22
		98.78%	0.19%

District 4 Subtotal			
Total:	120,992	118,947	474
		98.31%	0.39%
Voting Age:			91,841
			90,519
			302
		98.56%	0.33%
District 5			
County : Cabell			
Total:	96,784	90,370	4,150
		93.37%	4.29%
Voting Age:	77,382	72,746	3,112
		94.01%	4.02%
County : Wayne (part)			
Total:	3,270	3,210	4
		98.17%	0.12%
Voting Age:	2,720	2,672	4
		98.24%	0.15%
District 5 Subtotal			
Total:	100,054	93,580	4,154
		93.53%	4.15%
Voting Age:	80,102	75,418	3,116
		94.15%	3.89%

District 6

County : McDowell

Total:	27,329	23,792	3,250
		87.06%	11.89%
Voting Age:	20,995	18,360	2,449
		87.45%	11.66%

County : Mercer (part)

Total:	2,501	2,440	38
		97.56%	1.52%
Voting Age:	1,948	1,901	32
		97.59%	1.64%

County : Mingo

Total:	28,253	27,233	661
		96.39%	2.34%
Voting Age:	21,414	20,688	485
		96.61%	2.26%

County : Wayne (part)

Total:	28,883	28,554	43
		98.86%	0.15%
Voting Age:	21,953	21,760	25
		99.12%	0.11%

District 6 Subtotal

Total:	86,966	82,019	3,992
		94.31%	4.59%
Voting Age:	66,310	62,709	2,991
		94.57%	4.51%

District 7

County : Boone

Total:	25,535	25,160	167
		98.53%	0.65%
Voting Age:	19,610	19,362	119
		98.74%	0.61%

County : Lincoln

Total:	22,108	21,895	13
		99.04%	0.06%
Voting Age:	16,899	16,753	9
		99.14%	0.05%

County : Logan

Total:	37,710	36,325	975
		96.33%	2.59%
Voting Age:	29,374	28,359	728
		96.54%	2.48%

County : Wayne (part)

Total:	10,750	10,618	7
		98.77%	0.07%
Voting Age:	8,208	8,117	3
		98.89%	0.04%

District 7 Subtotal

Total:	96,103	93,998	1,162
		97.81%	1.21%
Voting Age:	74,091	72,591	859
		97.98%	1.16%

District 9			
County : Raleigh			
Total:	79,220	71,006	6,753
		89.63%	8.52%
Voting Age:	62,150	55,996	5,164
		90.10%	8.31%
County : Wyoming			
Total:	25,708	25,345	161
		98.59%	0.63%
Voting Age:	19,950	19,707	118
		98.78%	0.59%
District 9 Subtotal			
Total:	104,928	96,351	6,914
		91.83%	6.59%
Voting Age:	82,100	75,703	5,282
		92.21%	6.43%
District 10			
County : Fayette (part)			
Total:	19,511	18,173	1,014
		93.14%	5.20%
Voting Age:	15,096	14,134	753
		93.63%	4.99%
County : Mercer (part)			
Total:	60,479	55,855	3,630
		92.35%	6.00%
Voting Age:	47,762	44,450	2,621
		93.07%	5.49%

County : Monroe			
Total:	14,583	13,514 92.67%	872 5.98%
Voting Age:	11,650	10,683 91.70%	832 7.14%
County : Summers			
Total:	12,999	12,553 96.57%	280 2.15%
Voting Age:	10,330	10,017 96.97%	204 1.97%
District 10 Subtotal			
Total:	107,572	100,095 93.05%	5,796 5.39%
Voting Age:	84,838	79,284 93.45%	4,410 5.20%
District 11			
County : Clay			
Total:	10,330	10,146 98.22%	8 0.08%
Voting Age:	7,686	7,563 98.40%	6 0.08%
County : Fayette (part)			
Total:	28,068	25,952 92.46%	1,636 5.83%
Voting Age:	22,143	20,472 92.45%	1,326 5.99%
County : Greenbrier			
Total:	34,453	32,810 95.23%	1,048 3.04%
Voting Age:	26,996	25,779 95.49%	819 3.03%

County : Nicholas			
Total:	26,562	26,255	14
		98.84%	0.05%
Voting Age:	20,374	20,158	6
		98.94%	0.03%
County : Webster			
Total:	9,719	9,639	1
		99.18%	0.01%
Voting Age:	7,487	7,429	0
		99.23%	0.00%
District 11 Subtotal			
Total:	109,132	104,802	2,707
		96.03%	2.48%
Voting Age:	84,686	81,401	2,157
		96.12%	2.55%
District 12			
County : Braxton			
Total:	14,702	14,411	101
		98.02%	0.69%
Voting Age:	11,356	11,132	88
		98.03%	0.77%
County : Gilmer			
Total:	7,160	6,969	65
		97.33%	0.91%
Voting Age:	5,708	5,552	57
		97.27%	1.00%
County : Harrison			
Total:	68,652	66,282	1,105
		96.55%	1.61%
Voting Age:	52,794	51,118	783
		96.83%	1.48%

County : Lewis			
Total:	16,919	16,681	22
		98.59%	0.13%
Voting Age:	13,180	13,019	21
		98.78%	0.16%
District 12 Subtotal			
Total:	107,433	104,343	1,293
		97.12%	1.20%
Voting Age:	83,038	80,821	949
		97.33%	1.14%
District 13			
County : Marion (part)			
Total:	52,155	49,444	1,817
		94.80%	3.48%
Voting Age:	41,508	39,603	1,329
		95.41%	3.20%
County : Monongalia (part)			
Total:	60,914	55,196	2,559
		90.61%	4.20%
Voting Age:	51,262	46,684	2,141
		91.07%	4.18%
District 13 Subtotal			
Total:	113,069	104,640	4,376
		92.55%	3.87%
Voting Age:	92,770	86,287	3,470
		93.01%	3.74%

District 14

County : Barbour

Total:	15,557	15,147	77
		97.36%	0.49%
Voting Age:	11,980	11,675	66
		97.45%	0.55%

County : Grant (part)

Total:	2,474	2,429	8
		98.18%	0.32%
Voting Age:	1,941	1,910	8
		98.40%	0.41%

County : Mineral (part)

Total:	22,539	21,564	672
		95.67%	2.98%
Voting Age:	17,336	16,665	495
		96.13%	2.86%

County : Monongalia (part)

Total:	20,952	20,304	204
		96.91%	0.97%
Voting Age:	15,688	15,273	153
		97.35%	0.98%

County : Preston

Total:	29,334	28,995	86
		98.84%	0.29%
Voting Age:	22,390	22,168	60
		99.01%	0.27%

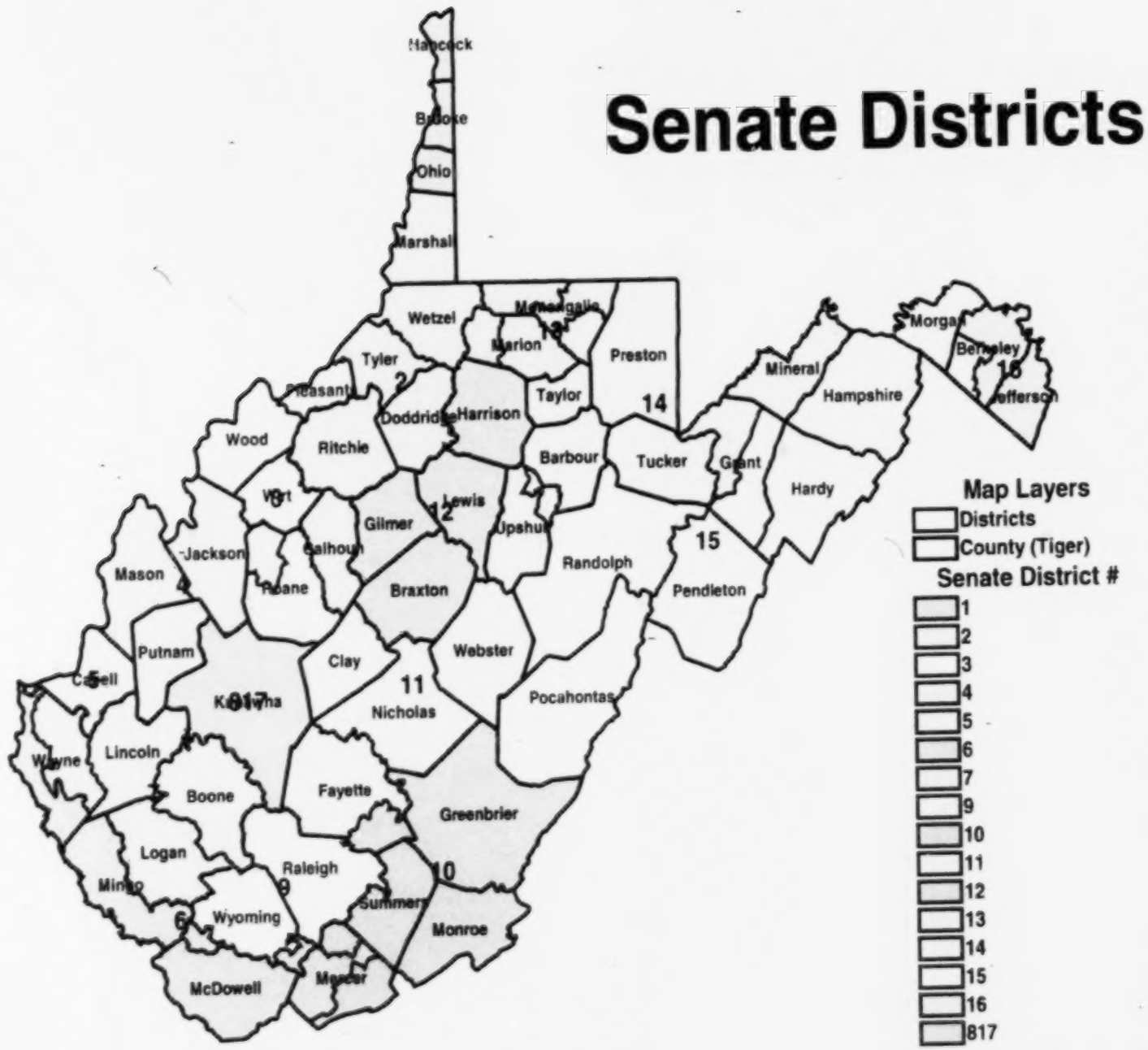
County : Taylor

Total:	16,089	15,779	134
		98.07%	0.83%
Voting Age:	12,403	12,192	102
		98.30%	0.82%

County : Tucker			
Total:	7,321	7,237 98.85%	5 0.07%
Voting Age:	5,764	5,716 99.17%	1 0.02%
District 14 Subtotal			
Total:	114,266	111,455 97.54%	1,186 1.04%
Voting Age:	87,502	85,599 97.83%	885 1.01%
District 15			
County : Grant (part)			
Total:	8,825	8,681 98.37%	68 0.77%
Voting Age:	6,796	6,703 98.63%	51 0.75%
County : Hampshire			
Total:	20,203	19,807 98.04%	167 0.83%
Voting Age:	15,122	14,849 98.19%	111 0.73%
County : Hardy			
Total:	12,669	12,273 96.87%	244 1.93%
Voting Age:	9,715	9,434 97.11%	191 1.97%
County : Mineral (part)			
Total:	4,539	4,473 98.55%	18 0.40%
Voting Age:	3,411	3,366 98.68%	13 0.38%

County : Pendleton			
Total:	8,196	7,896	174
		96.34%	2.12%
Voting Age:	6,407	6,206	125
		96.86%	1.95%
County : Pocahontas			
Total:	9,131	8,983	71
		98.38%	0.78%
Voting Age:	7,227	7,101	68
		98.26%	0.94%
County : Randolph			
Total:	28,262	27,609	302
		97.69%	1.07%
Voting Age:	21,952	21,424	271
		97.59%	1.23%
County : Upshur			
Total:	23,404	22,981	144
		98.19%	0.62%
Voting Age:	18,126	17,811	120
		98.26%	0.66%
District 15 Subtotal			
Total:	115,229	112,703	1,188
		97.81%	1.03%
Voting Age:	88,756	86,894	950
		97.90%	1.07%
District 16			
County : Berkeley			
Total:	75,905	70,392	3,558
		92.74%	4.69%
Voting Age:	56,376	52,803	2,429
		93.66%	4.31%

County : Jefferson			
Total:	42,190	38,400 91.02%	2,571 6.09%
Voting Age:	32,124	29,439 91.64%	1,918 5.97%
County : Morgan			
Total:	14,943	14,689 98.30%	89 0.60%
Voting Age:	11,595	11,408 98.39%	72 0.62%
District 16 Subtotal			
Total:	133,038	123,481 92.82%	6,218 4.67%
Voting Age:	100,095	93,650 93.56%	4,419 4.41%
District 817			
County : Kanawha			
Total:	200,073	180,989 90.46%	13,955 6.97%
Voting Age:	157,435	144,259 91.63%	9,950 6.32%
District 817 Subtotal			
Total:	200,073	180,989 90.46%	13,955 6.97%
Voting Age:	157,435	144,259 91.63%	9,950 6.32%


Senate Districts
Hancock
Brooke
Ohio
Marshall
Wetzel
Monongalia
Marion
Preston
Tyler
Pleasant
Doddridge
Harrison
Taylor
Wood
Ritchie
Barbour
Tucker
Mineral
Hampshire
Morgan
Berkeley
Jefferson
Grant
Hardy
Wirt
Lewis
Gilmer
Upshur
Randolph
Pendleton
Jackson
Mason
Calhoun
Roane
Braxton
Putnam
Clay
Webster
Cabell
Kanawha
Nicholas
Pocahontas
Wayne
Lincoln
Boone
Fayette
Greenbrier
Logan
Raleigh
Mingo
Wyoming
Summers
Monroe
McDowell
Mercer
Map Layers
Districts
County (Tiger)
Senate District #
1
2
3
4
5
6
7
9
10
11
12
13
14
15
16
817

Plan: 2000 Senate Plan
Plan Type:

Administrator
User:

Population Summary Report (multi-member)

Friday, November 30, 2001 10:32 AM

DISTRICT	NUMBER OF MEMBERS	POPULATION	IDEAL POPULATION	DEVIATION	% DEVIATION
1	2	101,536	106,374	-2,419	-4.55
2	2	106,035	106,374	-170	-0.32
3	2	110,713	106,374	2,170	4.08
4	2	111,652	106,374	2,639	4.96
5	2	104,316	106,374	-1,029	-1.93
6	2	101,069	106,374	-2,653	-4.99
7	2	101,388	106,374	-2,493	-4.69
9	2	101,722	106,374	-2,326	-4.37
10	2	105,747	106,374	-314	-0.59
11	2	111,413	106,374	2,520	4.74
12	2	107,433	106,374	530	1.00
13	2	110,979	106,374	2,303	4.33
14	2	111,469	106,374	2,548	4.79
15	2	111,344	106,374	2,485	4.67
16	2	111,455	106,374	2,541	4.78

DISTRICT	NUMBER OF MEMBERS	POPULATION	IDEAL POPULATION	DEVIATION	% DEVIATION
817	4	200,073	212,748	-3,169	-5.96

Total Population: 1,808,344
Ideal Population: 53,187

Summary Statistics

Population Range: 50,018 to 55,826
Ratio Range: 1.12
Unadjusted Absolute Range: -12,675 to 5,278
Absolute Range: -3,169 to 2,639
Absolute Overall Range: 5,808
Relative Range: -5.96% to 4.96%
Relative Overall Range: 10.92%
Absolute Mean Deviation: 197.61
Relative Mean Deviation: 0.37%
Standard Deviation: 2,277.93

Plan: 2000 Senate Plan
Plan Type

Administrator:
User:

Plan Components Report

Friday, November 30, 2001 10:33 AM

	Population
District 1	
Brooke County	25,447
Hancock County	32,667
Ohio County	
VTD: 1	1,135
VTD: 10	664
VTD: 103	670
VTD: 104	2,194
VTD: 107	1,217
VTD: 108	1,434
VTD: 11	1,044
VTD: 113	722
VTD: 115	790
VTD: 116	711
VTD: 119	713
VTD: 12	808
VTD: 120	916
VTD: 122	559
VTD: 124	848
VTD: 125	1,375
VTD: 127	1,747
VTD: 128	579
VTD: 129	1,113
VTD: 13	1,064
VTD: 130	994
VTD: 131	861
VTD: 135	1,463

VTD: 137	1,201
VTD: 14	183
VTD: 141	604
VTD: 143	749
VTD: 146	2,422
VTD: 148	903
VTD: 158	2,013
VTD: 16	1,071
VTD: 161	2,063
VTD: 20	1,033
VTD: 23	370
VTD: 24	521
VTD: 28	272
VTD: 29	1,548
VTD: 31	564
VTD: 36	523
VTD: 4	1,225
VTD: 49	554
VTD: 5	1,294
VTD: 77	688
Ohio County Subtotal	**43,422**
District 1 Subtotal	**101,536**
District 2	
Calhoun County	7,582
Doddridge County	7,403
Marion County	
VTD: 59	987
VTD: 66	880
VTD: 67	609
VTD: 68	448
VTD: 69	516
VTD: 70	512
VTD: 72	436
VTD: 74	747
VTD: 78	295
Marion County Subtotal	**5,430**
Marshall County	35,519

Monongalia County	
VTD: 40	517
VTD: 41	311
VTD: 42	663
VTD: 44	1,095
VTD: 47	1,137
VTD: 51	605
VTD: 52	1,717
VTD: 53	431
VTD: 54	790
VTD: 55	801
VTD: 58	391
VTD: 67 *(part)*	10
VTD: 68 *(part)*	0
Monogalia County Subtotal	**8,468**
Ohio County	
VTD: 100	609
VTD: 102	254
VTD: 60	1,262
VTD: 64	769
VTD: 69 (5406969)	1,111
Ohio County Subtotal	**4,005**
Ritchie County	10,343
Tyler County	9,592
Wetzel County	17,693
District 2 Subtotal	**106,035**
District 3	
Pleasants County	7,514
Roane County	
VTD: 10	668
VTD: 15	386
VTD: 16	593
VTD: 22 *(part)*	469
VTD: 25	1,220
VTD: 28	1,067

VTD: 29	294
VTD: 30	971
VTD: 32	870
VTD: 4	477
VTD: 5	1,766
VTD: 7	559
Roane County Subtotal	**9,340**
Wirt County	5,873
Wood County	87,986
District 3 Subtotal	**110,713**
District 4	
Jackson County	28,000
Mason County	25,957
Putnam County	51,589
Roane County	
VTD: 1	745
VTD: 11	872
VTD: 12	198
VTD: 18	544
VTD: 19	520
VTD: 20	798
VTD: 21	490
VTD: 22 *(part)*	902
VTD: 23	1,037
Roane County Subtotal	**6,106**
District 4 Subtotal	**111,652**
District 5	
Cabell County	96,784
Wayne County	
VTD: 11	711
VTD: 12 *(part)*	860
VTD: 16 *(part)*	0
VTD: 56	1,762

VTD: 59	1,230
VTD: 60	1,180
VTD: 61	920
VTD: 62 *(part)*	68
VTD: 63	801
Wayne County Subtotal	**7,532**
District 5 Subtotal	**104,316**
District 6	
McDowell County	27,329
Mercer County	
VTD: 2	986
VTD: 3	1,642
VTD: 4	918
VTD: 42	965
VTD: 46	479
VTD: 49	319
VTD: 5	1,041
VTD: 51	442
VTD: 52	463
VTD: 53	1,389
VTD: 54	1,044
VTD: 55	621
VTD: 57 *(part)*	56
VTD: 58	843
VTD: 60	489
VTD: 61	265
VTD: 62	1,585
VTD: 66	1,498
VTD: 67	548
VTD: 68	235
VTD: 69	1,425
VTD: 71	2,136
VTD: 72	1,882
VTD: 79	1,211
VTD: 96	463
Mercer County Subtotal	**22,945**
Mingo County	28,253

Wayne County	
VTD: 1	1,694
VTD: 12 *(part)*	0
VTD: 13	1,533
VTD: 14	1,889
VTD: 16 *(part)*	853
VTD: 17	1,023
VTD: 18	944
VTD: 20	1,164
VTD: 21	788
VTD: 3 (540993)	1,352
VTD: 31	1,169
VTD: 34	800
VTD: 36	1,149
VTD: 37	1,075
VTD: 38	265
VTD: 5 (540995)	1,284
VTD: 6	819
VTD: 62 *(part)*	1,535
Wayne County Subtotal	**19,336**
Wyoming County	
VTD: 10	397
VTD: 11	240
VTD: 23	206
VTD: 24	1,464
VTD: 25	622
VTD: 5 (541095)	277
Wyoming County Subtotal	**3,206**
District 6 Subtotal	**101,069**
District 7	
Boone County	25,535
Lincoln County	22,108
Logan County	37,710

Wayne County	
VTD: 19	1,651
VTD: 22	920
VTD: 30	863
VTD: 41	1,170
VTD: 42	720
VTD: 45	1,065
VTD: 48	1,363
VTD: 49	1,763
VTD: 50	1,737
VTD: 51	935
VTD: 52	658
VTD: 53	1,246
VTD: 54	833
VTD: 57	1,111
Wayne County Subtotal	**16,035**
District 7 Subtotal	**101,388**
District 9	
Raleigh County	79,220
Wyoming County	
VTD: 1	230
VTD: 12	235
VTD: 13	173
VTD: 14	352
VTD: 16	479
VTD: 18	941
VTD: 19	1,245
VTD: 2	769
VTD: 20	1,919
VTD: 21	630
VTD: 22	132
VTD: 27	343
VTD: 28	494
VTD: 29	880
VTD: 30	548
VTD: 31	1,912

VTD: 32	928
VTD: 33	420
VTD: 34	178
VTD: 36	166
VTD: 37	38
VTD: 38	631
VTD: 39	324
VTD: 4	0
VTD: 40	311
VTD: 42	1,183
VTD: 43	1,099
VTD: 44	297
VTD: 45	786
VTD: 47	1,163
VTD: 48	34
VTD: 6	574
VTD: 7	334
VTD: 8	300
VTD: 9	311
VTD: 99	957
Wyoming County Subtotal	**22,502**
District 9 Subtotal	**101,722**
District 10	
Fayette County	
VTD: 68	1,555
VTD: 72	2,122
Fayette County Subtotal	**3,677**
Greenbrier County	34,453
Mercer County	
VTD: 1	916
VTD: 14	869
VTD: 15	1,557
VTD: 20	1,267
VTD: 27	477
VTD: 28	1,137
VTD: 30	423

VTD: 31	740
VTD: 32	477
VTD: 33	518
VTD: 34	1,280
VTD: 36	1,046
VTD: 37	668
VTD: 38	977
VTD: 44	1,538
VTD: 47	736
VTD: 48	233
VTD: 56	2,419
VTD: 57 *(part)*	1,633
VTD: 59	905
VTD: 64	867
VTD: 65	229
VTD: 73	2,647
VTD: 74	859
VTD: 77	877
VTD: 78	667
VTD: 80	2,842
VTD: 81	1,286
VTD: 82	725
VTD: 83	374
VTD: 84	1,243
VTD: 85	418
VTD: 86	906
VTD: 87	1,078
VTD: 88	2,382
VTD: 89	934
VTD: 95	744
VTD: 98	1,141
Mercer County Subtotal	**40,035**
Monroe County	14,583
Summers County	12,999
District 10 Subtotal	**105,747**

District 11

Clay County	10,330
Fayette County	
VTD: 1	1,291
VTD: 10	1,377
VTD: 11	1,006
VTD: 12	1,779
VTD: 13	1,268
VTD: 15	1,309
VTD: 16	684
VTD: 17	1,186
VTD: 18	755
VTD: 19	2,058
VTD: 23	1,739
VTD: 24	355
VTD: 26	1,465
VTD: 28	901
VTD: 29	1,541
VTD: 31	426
VTD: 32	566
VTD: 37	726
VTD: 38	890
VTD: 4 (540194)	1,635
VTD: 41	1,159
VTD: 42 (5401942)	440
VTD: 45	543
VTD: 46	1,448
VTD: 47	1,566
VTD: 5	1,199
VTD: 51	582
VTD: 52	1,267
VTD: 53	685
VTD: 55	1,647
VTD: 56	871
VTD: 58	1,833
VTD: 59	957

VTD: 60	1,230
VTD: 65	623
VTD: 67	989
VTD: 74	1,012
VTD: 8	1,797
VTD: 9	1,097
Fayette County Subtotal	**43,902**
Nicholas County	26,562
Upshur County	
VTD: 12 (5409712)	750
VTD: 13 (5409713)	545
VTD: 14	1,083
VTD: 15 (5409715)	1,746
VTD: 16 (5409716)	602
VTD: 18 (5409718)	1,293
VTD: 19 (5409719)	919
VTD: 20	1,224
VTD: 25	767
VTD: 27	1,634
VTD: 35	2,358
VTD: 38 (5409738)	823
VTD: 4	871
VTD: 42	388
VTD: 44	1,409
VTD: 47 (5409747)	1,484
VTD: 6	1,069
VTD: 7	332
VTD: 8 (540978)	619
VTD: 9 (540979)	984
Upshur County Subtotal	**20,900**
Webster County	9,719
District 11 Subtotal	**111,413**
District 12	
Braxton County	14,702
Gilmer County	7,160

Harrison County	68,652
Lewis County	16,919
District 12 Subtotal	**107,433**
District 13	
Marion County	
VTD: 1	820
VTD: 100	473
VTD: 101	775
VTD: 102	739
VTD: 104	813
VTD: 112	1,097
VTD: 113	871
VTD: 114	667
VTD: 115	1,217
VTD: 116	821
VTD: 117	2,052
VTD: 118	298
VTD: 120	1,180
VTD: 121	471
VTD: 122	787
VTD: 123	727
VTD: 124	816
VTD: 125	922
VTD: 13 (5404913)	947
VTD: 16 (5404916)	907
VTD: 18 (5404918)	1,282
VTD: 2 (540492)	1,138
VTD: 20 (5404920)	1,311
VTD: 27	634
VTD: 28 (5404928)	689
VTD: 29	527
VTD: 30	618
VTD: 31	1,291
VTD: 32	563
VTD: 33	721
VTD: 34	585

VTD: 35	771
VTD: 36	445
VTD: 40	1,486
VTD: 41	1,666
VTD: 42	1,347
VTD: 43	465
VTD: 44	444
VTD: 45	1,195
VTD: 47	571
VTD: 48	594
VTD: 5 (540495)	795
VTD: 50	1,284
VTD: 51	459
VTD: 52	732
VTD: 53	976
VTD: 55	610
VTD: 56	624
VTD: 57	495
VTD: 58	586
VTD: 6 (540496)	686
VTD: 61	606
VTD: 62	608
VTD: 7 (540497)	731
VTD: 82 (5404982)	694
VTD: 83 (5404983)	458
VTD: 86	657
VTD: 87	435
VTD: 88	696
VTD: 89	788
VTD: 90	394
VTD: 92 (5404992)	668
VTD: 96	921
VTD: 98	522
Marion County Subtotal	**51,168**
Monongalia County	
VTD: q1 *(part)*	832
VTD: 10	751

VTD: 12	4,638
VTD: 13	1,437
VTD: 14	863
VTD: 15	348
VTD: 16	807
VTD: 17	1,146
VTD: 18	1,779
VTD: 2	989
VTD: 20	1,027
VTD: 21	444
VTD: 22	1,163
VTD: 23	818
VTD: 24	832
VTD: 25	785
VTD: 26	430
VTD: 27 (5406127)	496
VTD: 28	478
VTD: 29 (5406129)	646
VTD: 3	717
VTD: 30 (5406130)	411
VTD: 31 (5406131)	1,155
VTD: 32 (5406132)	1,248
VTD: 35 (5406135)	1,096
VTD: 36A	464
VTD: 36B	455
VTD: 39	531
VTD: 4	764
VTD: 46	424
VTD: 48 (5406148)	389
VTD: 49	305
VTD: 5	647
VTD: 56 (5406156)	150
VTD: 6	486
VTD: 64	699
VTD: 67 *(part)*	1,175
VTD: 68 *(part)*	1,264
VTD: 69	796

VTD: 7	702
VTD: 70	793
VTD: 71	888
VTD: 72	570
VTD: 73	844
VTD: 74	778
VTD: 75	336
VTD: 76	316
VTD: 77	2,806
VTD: 78	615
VTD: 79	2,545
VTD: 8	1,366
VTD: 80	838
VTD: 81	798
VTD: 82	412
VTD: 83	2,005
VTD: 84	939
VTD: 85 *(part)*	0
VTD: 86 (5406186)	1,167
VTD: 87 (5406187)	2,585
VTD: 88 (5406188)	1,449
VTD: 9	308
VTD: 90 (5406190)	480
VTD: 91	1,540
VTD: 92	846
Monongalia County Subtotal	**59,811**
District 13 Subtotal	**110,979**
District 14	
Barbour County	15,557
Grant County	
VTD: 10	501
VTD: 14	433
VTD: 15	820
VTD: 8	543
VTD: 9	206
Grant County Subtotal	**2,503**
Mineral County	27,078

Monongalia County	
VTD: 1 *(part)*	0
VTD: 33	1,387
VTD: 34	1,887
VTD: 37	1,060
VTD: 38	2,629
VTD: 59	1,168
VTD: 60	751
VTD: 61	1,914
VTD: 62	1,737
VTD: 63	807
VTD: 85 *(part)*	247
Monongalia County Subtotal	**13,587**
Preston County	29,334
Taylor County	16,089
Tucker County	7,321
District 14 Subtotal	**111,469**
District 15	
Berkeley County	
VTD: 22 *(part)*	573
VTD: 43 *(part)*	1,144
VTD: 45	1,922
VTD: 46 *(part)*	967
VTD: 47	1,490
VTD: 51 *(part)*	544
Berkeley County Subtotal	**6,640**
Grant County	
VTD: 1	991
VTD: 11	1,257
VTD: 12	965
VTD: 13	575
VTD: 2	1,430
VTD: 3	217
VTD: 4	731
VTD: 5	560

VTD: 6	1,004
VTD: 7	1,066
Grant County Subtotal	**8,796**
Hampshire County	20,203
Hardy County	12,669
Morgan County	14,943
Pendleton County	8,196
Pocahontas County	9,131
Randolph County	28,262
Upshur County	
VTD: 33	1,221
VTD: 39	1,283
Upshur County Subtotal	**2,504**
District 15 Subtotal	**111,344**
District 16	
Berkeley County	
VTD: 1	1,944
VTD: 10	1,770
VTD: 11	640
VTD: 14	1,033
VTD: 15	333
VTD: 15A	606
VTD: 16	1,787
VTD: 17	1,660
VTD: 18	2,292
VTD: 19	2,318
VTD: 2	1,432
VTD: 20	1,460
VTD: 21	3,869
VTD: 22 *(part)*	663
VTD: 23	1,549
VTD: 24	3,278
VTD: 25	1,218

VTD: 25A	722
VTD: 26	1,828
VTD: 27	1,445
VTD: 28	2,823
VTD: 29	1,249
VTD: 31	2,420
VTD: 32	2,030
VTD: 33	2,219
VTD: 34	1,373
VTD: 35	1,379
VTD: 36	1,799
VTD: 37	2,271
VTD: 38	1,631
VTD: 39	1,280
VTD: 40	2,179
VTD: 41	2,041
VTD: 42	1,406
VTD: 43 *(part)*	385
VTD: 44	794
VTD: 46 *(part)*	668
VTD: 48	1,417
VTD: 49	1,226
VTD: 55	1,524
VTD: 50	334
VTD: 51 *(part)*	1,038
VTD: 6	989
VTD: 7	1,255
VTD: 8	1,018
VTD: 9	670
Berkeley County Subtotal	**69,265**
Jefferson County	42,190
District 16 Subtotal	**111,455**
District 817	
Kanawha County	200,073
District 817 Subtotal	**200,073**
State totals	**1,808,344**

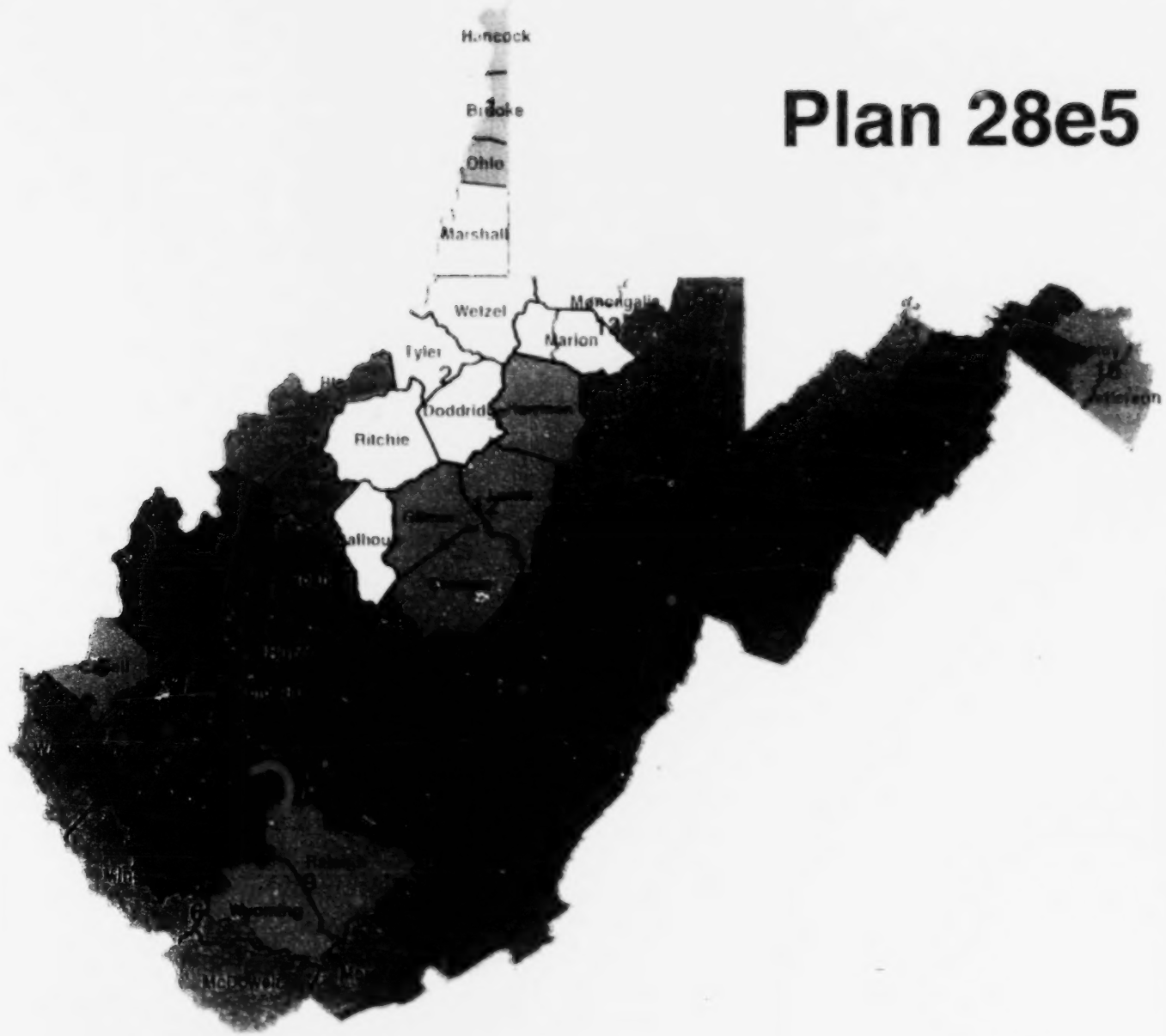


EXHIBIT
2

BEST AVAILABLE COPY

Plan: Plan 28e5
Plan Type:

Administrator
User:

Population Summary Report (multi-member)

Thursday, November 29, 2001 9:00 AM

DISTRICT	NUMBER OF MEMBERS	POPULATION	IDEAL POPULATION	DEVIATION	% DEVIATION
1	2	101,536	106,374	-2,419	-4.55
2	2	106,035	106,374	-170	-0.32
3	2	101,373	106,374	-2,501	-4.70
4	2	105,546	106,374	-414	-0.78
5	2	104,316	106,374	-1,029	-1.93
6	2	102,013	106,374	-2,181	-4.10
7	2	101,388	106,374	-2,493	-4.69
9	2	101,645	106,374	-2,365	-4.45
10	2	104,880	106,374	-747	-1.40
11	2	111,413	106,374	2,520	4.74
12	2	107,433	106,374	530	1.00
13	2	110,979	106,374	2,303	4.33
14	2	111,469	106,374	2,548	4.79
15	2	111,319	106,374	2,473	4.65
16	2	111,480	106,374	2,553	4.80

DISTRICT	NUMBER OF MEMBERS	POPULATION	IDEAL POPULATION	DEVIATION	% DEVIATION
817	4	215,519	212,748	693	1.30

Total Population: 1,808,344
Ideal Population: 53,187

Summary Statistics

Population Range: 50,687 to 55,740
Ratio Range: 1.10
Unadjusted Absolute Range: -5,001 to 5,106
Absolute Range: -2,501 to 2,553
Absolute Overall Range: 5,054
Relative Range: -4.70% to 4.80%
Relative Overall Range: 9.50%
Absolute Mean Deviation: -43.73
Relative Mean Deviation: -0.08%
Standard Deviation: 2,032.76

Supreme Court, U.S.
FILED
MAY 29 2002
OFFICE OF THE CLERK

No. 01-1600

In The
Supreme Court of the United States

JOHN UNGER, II, ET AL.,

Appellants,

v.

JOSEPH MANCHIN, III, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of West Virginia

MOTION TO AFFIRM

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QUESTION PRESENTED

Appellees object to the appellants' statement of the issue presented in this case. Appellees dispute the assertions made in appellants' "question presented" that the redistricting plan at issue "violated [the] State Constitution," that there is a "violation of the Equal Protection Clause" in the plan, or that the reasons cited by the Legislature to explain any deviation from strict equality of population "were not consistently applied." A more accurate framing of the question presented is:

> Whether the West Virginia Legislature's purposes in redistricting its Senate with a maximum deviation from absolute equality of 10.92% were sufficient to satisfy the requirements of the Equal Protection Clause.

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ARGUMENT

INTRODUCTION

The jurisdictional statement has failed to identify any reason why this Court should reverse – or even grant full review to – this appeal from a straightforward and (as will be shown) eminently correct application of settled doctrine. From the limited amount of litigation (other than that relating to racial gerrymandering) that has ensued from the past two decennial redistricting cycles, one can infer that the Court's doctrines have achieved clarity and general acceptance. This case thus presents no issue of interest, let alone one of import or conflict.

In their jurisdictional statement, appellants persistently oversimplify the redistricting process and fail to appreciate that the West Virginia Legislature had multiple goals that its plan reasonably advanced but that also frequently clashed with each other, and all had to be compromised to some extent. As the district court observed,

> The legislature has adopted five rational and legitimate policy goals to justify a deviation in excess of 10%. In many respects these goals are competing and must be balanced by the legislature. We cannot conclude from the facts of this case that, in the balancing process, the legislature has failed to meet the requirement that the policies be consistent applied. Accordingly, we hold that [the Senate redistricting] is constitutional.

Appendix[1] at 13. That court consisted of three judges from West Virginia who are intimately familiar with the geopolitical configuration of the State. As demonstrated below, its decision was eminently correct.

THE WEST VIRGINIA LEGISLATURE CONSTITUTIONALLY REDISTRICTED ITS SENATE WHEN IT ADOPTED A PLAN IN WHICH ALL BUT TWO DISTRICTS WERE WITHIN +/- 5% OF IDEAL EQUALITY, IN WHICH THE AVERAGE VARIATION FROM THE IDEAL WAS 3.92%, IN WHICH THE MAXIMUM DEVIATION WAS 10.92%, AND IN WHICH THE MINIMAL INEQUALITY WAS JUSTIFIED BY THE PLAN'S PROMOTION OF LEGITIMATE AND SUBSTANTIAL PURPOSES.

A. Because the West Virginia Senate's Redistricting Plan Has a Maximum Deviation from Absolute Equality in Excess of 10%, the State Must Show that Its Plan Furthers Legitimate Interests that Justify the Deviation.

There is no disagreement among the parties regarding the applicable doctrine. Since *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has held that the Fourteenth Amendment's Equal Protection Clause requires equality of representation in state legislatures. A state must therefore "make an honest and good-faith effort to construct its districts 'as nearly of equal population as is practicable,' but [*Reynolds* also recognized] that absolute equality was a 'practical impossibility': 'Mathematical exactness or

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[1] Citations to "Appendix" refer to the appendix that the appellants have filed with their jurisdictional statement.

precision is hardly a workable constitutional requirement.' " *Gaffney v. Cummings*, 412 U.S. 735, 743 (1973), *quoting Reynolds*, 377 U.S. at 577. Although the Court, applying Article I, § 2, of the federal constitution, has required strict equality for congressional districts within a State and has held that even *de minimis* variances must be justified, *see, e.g., Karcher v. Daggett*, 462 U.S. 725 (1983), the equal protection analysis applicable to state legislative redistricting allows for considerably greater flexibility. *E.g., Gaffney; Mahan v. Howell*, 410 U.S. 315 (1973). In such cases, the Court has, in essence, identified three levels of analysis:

> [I]t has become apparent that the larger variations from substantial equality are too great to be justified by any state interest so far suggested. . . . On the other hand, as *Mahan v. Howell* demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. . . . [M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.

Gaffney, 412 U.S. at 744-45. After *White v. Regester*, 412 U.S. 755 (1973), concluded that a 9.9% maximum variance was so insignificant as not to require any justification, the Court ultimately offered a rough demarcation for the third analytical tier: "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *accord Voinovich v. Quilter*, 507 U.S.

146, 161 (1993). "A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." *Brown v. Thomson*, 462 U.S. at 842-43.

In this case, the challenged senatorial redistricting plan has a maximum deviation of 10.92%. Thus, the appellants stated a prima facie case that required the State to justify the variance. *Mahan* sets forth the proper analysis for assessing the state's justification. First, it must be determined whether the state has provided "legitimate considerations incident to the effectuation of a rational state policy[.]" 410 U.S. at 325, *quoting Reynolds*, 377 U.S. at 579. If it has, then the "inquiry becomes whether it can reasonably be said that the state policy urged by [the State] to justify the divergences in the legislative reapportionment plan . . . is, indeed, furthered by the plan adopted by the legislature[.]" 410 U.S. at 326. If it can, then the "remaining inquiry is whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." *Id.* at 328.

In assessing whether the State can justify the Plan's deviations from equality, the degree of disparity naturally determines the weight of the State's burden. *Karcher*, 462 U.S. at 741 ("showing required to justify population deviations is flexible, depending on [*inter alia*] the size of the deviations"). Here, with a maximum variance of 10.92%, the Senate Plan barely exceeds the level that requires justification and is substantially less than the

"relatively minor deviation" of 16.4% that *Mahan* upheld.[2] 410 U.S. at 329; *see also Abate v. Mundt*, 403 U.S. 182 (1971) (sustaining 11.9% maximum deviation in redistricting plan for election of County Board of Supervisors). Thus, while appellees concede that justification is required for the population variance, the sliding scales of the applicable, flexible analysis do not impose a particularly heavy burden on the State.

As the district court and the appellants have pointed out, the Legislature set forth five criteria in West Virginia Code 1-2-1(c) that it used to create its new senatorial districts. Additional purposes can also be inferred from content of the plan. In brief, the Legislature sought to achieve population equality to the extent consistent with the attainment of other legitimate and traditional redistricting goals. Those other goals are: maintaining as many whole counties as feasible; creating compact and contiguous districts; respecting communities of interest; and avoiding radical changes to the pre-existing district structure. The plan in § 1-2-1 simultaneously promotes yet compromises all of those interests, and the issue that permeated consideration of each of the interests was whether to keep Kanawha County whole and retain its two superimposed districts.

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[2] Indeed, the maximum deviation was *at least* 16.4% and may well have been as large as 23.6%. 410 U.S. at 336-38 (Brennan, J., dissenting and concurring).

B. In Enacting the Senate Plan and to the Extent Consistent with Population Equality, the Legislature Sought to Adhere to the State Constitutional Requirements that Senatorial Districts Should Be Compact, Contiguous, and Consist of Whole Counties.

Article VI, § 4 of the West Virginia Constitution requires that senatorial districts must be "compact, formed of contiguous territory, [and] bounded by county lines[.]" In enacting § 1-2-1, the Legislature sought to advance those goals to the extent they were consistent with maintaining population equality. The requirements of compactness and contiguity are clearly legitimate goals, *e.g.*, *West Virginia Civil Liberties Union v. Rockefeller*, 336 F. Supp. 395 (S.D.W.V. 1972), as both serve to guard against gerrymanders and other forms of discrimination. *E.g., Karcher,* 462 U.S. at 755-58 (Stevens, J., concurring). For extreme illustrations, *see Shaw v. Hunt*, 517 U.S. 899 (1996), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). An examination of the map of § 1-2-1's Senate Districts (*see* Appendix at 51) reveals that the districts are contiguous and that the Legislature largely succeeded in creating compact districts, at least to the extent feasible in a state with two panhandles and vast stretches of sparsely populated areas. *See Stone v. Hechler*, 782 F. Supp. 1116, 1127 & n.19 (N.D.W.V. 1992) (3-judge court).

Regarding the interest in keeping counties whole, this Court has specifically held that respecting local government boundaries can justify deviations from equality in excess of 10%, *Voinovich*, 507 U.S. at 161-62; *Mahan v. Howell*, 410 U.S. at 328, and in *Mahan,* the Court concluded as well that the interest was sufficient to sustain a

plan with a significantly larger deviation from the norm than that imposed by § 1-2-1. Thus, there is no questioning the validity and weight of the legislative purpose of preserving whole counties when possible. The only question, then, is whether "it can reasonably be said" that the Legislature's Senate Plan furthers its interest in respecting county lines. *Mahan v. Howell*, 410 U.S. at 326 & 328.

West Virginia remained steadfast to the Article VI "bounded by county lines" requirement throughout its history up to and including the 1964 reapportionment, which remained in place until 1977. Beginning with the 1977 reapportionment,[3] and in each one since, the Legislature has found and declared "that it is not possible to divide the state into senatorial districts so as to achieve equality of population as near as is practicable as required by the United States supreme court and other federal courts and at the same time adhere to [Article VI, § 4] of the West Virginia Constitution."[4] In each of those Acts, the Legislature also recited the five findings set forth in West Virginia Code 1-2-1(c)(1)-(5), which (among other things) reaffirm its adherence to the "equality of population

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[3] The redistricting bill was passed during the 1976 legislative session but did not take effect until January 1, 1977. 1976 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 345 (Regular Session). The Legislature had enacted a redistricting plan in 1971, but that was vetoed by the Governor. *See Goines v. Rockefeller*, 338 F. Supp. 1189 (S.D.W.V. 1972).

[4] 1976 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 347 (Regular Session). For subsequent redistricting provisions repeating that language, *see* H.B. 511, 2001 ACTS OF THE LEGISLATURE (now § 1-2-1); 1991 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 307 (3rd Extraordinary Session); 1982 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 542 (Regular Session).

concept, while at the same time recognizing that from the formation of this state in the year [1863], each constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of government have been implemented along political subdivision lines" and that the enacted plan had "[d]eviated from the long-established state policy [of creating districts bounded by county lines] by crossing county lines only when necessary to ensure that all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population[.]"[5] Pursuant to that "long established state policy" and in respect for Article VI, § 4, the Legislature has continued to maintain districts that largely consist of whole counties and has, for the most part, crossed county lines only at the edges to ensure compliance with federal law. Thus, for example, § 1-2-1 leaves 44 of the State's 55 counties whole. Appendix at 51. Although only 3 of the districts are bounded entirely by county lines, *id.*, scrutiny of the districting map reveals that an overwhelming proportion of senate district lines, in linear terms, coincide with county lines.

Indeed, the shape of the State and its distribution of population made the whole county goal unachievable. No plan was put forward that included only bounded-by

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[5] H.B. 511; 1976 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 348 (Regular Session). 1991 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 308 (3rd Extraordinary Session); 1982 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 543 (Regular Session).

county-line districts, and none is practical. To understand that, one need not look any further than the Eastern Panhandle. Jefferson County, with a population of 42,000 could not, by itself support a district, but when Berkeley County is added onto it – and Berkeley is the only county that can be added to it – then the population total exceeds 117,000, which is more than 10% above the ideal district of 106,374. Appendix at 51, 68-69. To create a double district (as was done with districts 8 and 17) would require reaching deeply into the sparsely populated counties of the Eastern Highlands and would create an enormously large district with two distinctly different communities of interest. (That is, one facing the threat of urban sprawl problems and one sitting in sparsely populated country.) Moreover, the rural counties could legitimately object to their inclusion with the more densely populated Jefferson and Berkeley Counties; combining the counties of the current 15th and 16th districts into two superimposed districts would make it likely that the districts would end up with four senators from the more populous Panhandle and none from the mountain counties. An additional example of the impracticality of retaining only whole county districts can be found in the 5th district, where Cabell County, with 96,000 people, cannot by itself support a senatorial district, but adding to it anyone of its surrounding four counties would put it way over an acceptable deviation. (The smallest population of any adjoining county is Lincoln, and it has 22,000 people.)

Appellants (Jurisdictional Statement at 4, 15-16) and the district court (Appendix at 12) have appropriately observed that the Legislature extended the 2nd and 15th districts across county lines to add minute portions of, respectively, Ohio and Upshur Counties and that these

boundary crossings were not necessary to achieve population equality or (apparently) to advance any other stated purpose. These transgressions, which might have state constitutional significance, have only minimal federal constitutional relevance. They did not create or contribute to any inequality that exceeded the 10% window. Their only significance is that the Plan created by § 1-2-1 has 44 whole counties instead of 46. The district court rightly concluded that those two exceptions to the Legislature's design to cross county lines only when necessary to achieve equality of population did not significantly impeach the State's reliance on that goal. Appendix at 12-13.

In sum, the Legislature retained whole counties, whenever practicable, in all but two instances. The State is not required to adhere rigidly to a policy in order to claim it as a valid goal that will justify modest population deviations. *Mahan v. Howell*, 410 U.S. at 327-28 & n.9; *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (3-judge court). Overall, the Legislature has left forty-four counties whole and at least three others (Ohio, Upshur, and Wyoming) with only minimal intrusions into their borders. The appellants' advocated plan comes out about the same, as it includes eight split counties. Appendix at 71. Accordingly, § 1-2-1 "may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions." *Mahan v. Howell*, 401 U.S. at 328.

C. The Legislature Had Independent, Legitimate, and Overriding Reasons for Maintaining Kanawha County's Two Superimposed, Whole County Districts.

Most notably, and most importantly for the present case, the Legislature adhered to its respect for county lines in defining the 8th and 17th districts. It was that decision that created the possibility for this lawsuit, because all of the other senatorial districts are less than 5% from the ideal, and without at least one district over 5%, there could not be a 10% variance to state even the barest prima facie case. The Kanawha districts are just beyond the 5% line, at 5.92% under the norm. The Legislature, however, had compelling reasons for retaining Districts 8 and 17 as whole county districts.

The Legislature's dilemma regarding Kanawha County derived from that part of Article VI, § 4 of the West Virginia Constitution which provides for each district to elect two senators, "but, where the district is composed of more than one county, both shall not be chosen from the same county." This provision created particular problems as applied to Kanawha County. If the Legislature had done as the appellants have urged and added Roane County on to Kanawha to create a double district with a population 215,519, the deviation from equality would indeed have be limited to 1.3%. Appendix at 71. That move, however, would also have meant – as required by Article VI, § 4 – that two of the four senators from the district would have to be Roane County residents. Thus, Roane County, with 15,000 people, would have two residential senators, and Kanawha County, with 200,000 people, would get two residential senators. Appendix at 55-56, 70. While that

result would not create any federal constitutional problems, a rational legislator could certainly conclude that such an arrangement was to be avoided. Not only would it be a case of the tail wagging the dog, but the local interests and concerns of sparsely populated Roane County are very different from those confronting Kanawha County. Indeed, Roane Countians would not likely be thrilled by a system in which the election of its Senators will be determined by the overwhelmingly dominant numbers of citizens living in the City of Charleston and its suburbs.

Other options also had serious downsides. Splitting Kanawha County into a district roughly equivalent to the ideal and then attaching its remainder to a small county like Roane or Clay would have reduced even further the number of districts "bounded by county lines" and would have created the same problems as creating the double district with Roane County. That is, that proposal would also cost Kanawha County a resident senator and would combine very different communities of interest. If the county's voters were split evenly between two districts, with approximately one hundred thousand in each, then Kanawha County would be down to two resident senators and the attached counties contributing 6,000 people to each of the two districts would supply the other two senators. Again, a rational legislator could find that result unfair and undesirable. Further problems would arise if the County were carved into additional units and attached to three or more of any of the nine counties or five senate districts that abut Kanawha. Regardless of the number of Kanawha residents who might be elected to the Senate in that scenario, it would create political chaos for county officials who would have to deal with multiple sets of senators. And *none* of those senators could provide the

same kind and degree of attention to Kanawha County that it currently receives from all four of its Senate representatives.

Rather than force the State's largest county – with more than twice the population of the next largest – to surrender one or more of its residential senators and to cause the county to lose the other advantages of whole county status because of a shortfall in population that was only about 450 persons per senator shy of the +/- 5% window, the Legislature determined that the additional slight deviation from ideal equality was justified.

Appellants emphasize two other legislative decisions as examples of legislative inconstancy to its stated goals and of preferential treatment for Kanawha County. Each, however, is readily distinguishable and, in fact, reflects adherence to the criteria of § 1-2-1. The first example contrasts the treatment of Kanawha County with that rendered to the 5th district, which consists of Cabell County and a small portion of Wayne County. The Cabell-Wayne situation differs from Kanawha County for two reasons. First, Cabell County falls appreciably further from the ideal than does Kanawha County. With a population of about 96,000, Appendix at 56, Cabell County would fall 9.4% short of the population needed for the ideal senate district. That variance, the Legislature concluded, was simply too great to justify a separate district. Second, the City of Huntington straddles Cabell and Wayne Counties, and the piece of Wayne that was added to the 5th district permitted the entire City of Huntington to be within the same senatorial district. Thus, Cabell County must share a senator with Wayne County, but the latter will be a Huntington resident, and the entire district would comprise one distinct community of interest.

The second example that the appellants point to actually illustrates the necessity for having to compromise among goals. At page 17 of their jurisdictional statement, appellants ridicule the Legislature for its failure to adhere to its "community of interest" criterion in creating the 15th district.[6] According to appellants, the 15th district extends over nine counties, stretches 200 miles, and combines the very disparate interests of rural mountainous counties with Eastern Panhandle Counties that are part of the Washington-Baltimore Metropolitan Statistical Area. That is all true, and all of it is unavoidable. As previously explained, the population growth in the Eastern Panhandle meant that it had to be split. Jefferson County has 42,000 people and adjoins only Berkeley County. Appendix at 51 & 70. Therefore, Jefferson had to be attached to Berkeley. But Berkeley has 76,000 people. Appendix at 68-70. Hence, to stay within +/- 5% of ideal population, an area of Berkeley County comprising at least 4,700 people had to be excised from the 16th district. And that population could only be added to the 15th district because Berkeley touches only one other county, Morgan County, which in turn touches only one other county, Hampshire County. Once into Hampshire County, however, the district is already into the rural stretches of the Potomac Highlands and, to pick up sufficient population to satisfy equal protection standards, it would then have to continue either southward into sparsely populated stretches or eastward into areas that are also sparsely populated. In either direction, the resulting district would be very large; to pick

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[6] The district court also expressed bafflement about the size and composition of the 15th district. Appendix at 12. The text offers an explanation that should relieve any bafflement.

up the necessary 106,000 or so people in that region requires a very large catchment area. Thus, the Legislature had no alternative but to append the western end of Berkeley County and all of Morgan County to some very large piece of rural highlands.

The appellants' examples and their other arguments do not diminish the fact that retaining the 8th and 17th districts as single-county (Kanawha) districts served important legislative purposes in respecting county boundaries, communities of interest, compactness, and continuity. In addition, the retention also preserved pre-existing districts (*see* Part D, *infra*) and came very close to meeting the goal of equality of population. To the minimal extent that latter goal was compromised, the deviation was justified by legitimate legislative concerns in avoiding the creation of a political anomaly that Article VI, § 4 of the West Virginia Constitution would otherwise have imposed.

D. The Legislature Had a Legitimate and Important Interest in Preserving the Core of Pre-Existing Districts, and the Senate Plan Substantially Furthered that Interest.

Although the district court found it unnecessary to go beyond the criteria stated in § 1-2-1 to sustain the redistricting, *see* Appendix at 9-10, a comparison of the new plan with the old, makes clear that an additional purpose was to preserve the cores of pre-existing districts, a clearly legitimate interest that can justify population variances. *E.g.*, *Karcher*, 462 U.S. at 740; *Marylanders for FairRepresentation v. Schaefer*, 849 F. Supp. 1022, 1037 (D. Md. 1994) (3-judge court); *Stone v. Hechler*, 782

F. Supp. 1116, 1126 (N.D.W.V. 1992) (3-judge court). The Legislature's desire to retain as much of the basic structure as it could was not only rational but promoted critically important concerns. Stability and continuity in districts reduce voter confusion and, more importantly, promote voters' familiarity with their representatives. Senators can likewise continue to represent the voters and the local governments with whom they have grown familiar. These political relationships have real value in facilitating communication and understanding between constituents and their legislators.

Avoiding major district shifts is particularly important in the Senate because only half of the West Virginia Senate is elected with each election cycle. Shuffling counties and territory from one district to another creates the risk that some communities will be left for nearly three years with only one senator (or possibly none) residing within their districts. Section 1-2-1 was crafted to minimize that problem; only one senator's county was moved into a different district. Finally, preserving the core of pre-existing districts helps to avoid battles between incumbents, an interest which has been recognized as a legitimate redistricting concern. *E.g., Karcher*, 462 U.S. at 740. Such occasions not only create the risk, described above, of leaving areas underrepresented by resident senators but they also threaten legislative comity and collegiality and political stability.

Promoting that interest explains much of the deviation from absolute equality in the senate plan. Obviously, that goal was best served by leaving the boundaries of the 8th and 17th districts unchanged. In addition, significant population shifts from the southern counties and into the eastern counties strained the Legislature's ability to

preserve the basic identity of the old districts. It managed to accomplish that goal only by using most of the +/- 5% window in most districts and by exceeding it slightly in the 8th and 17th districts.

E. The Senate Plan Enacted in Section 1-2-1 Appropriately Balances the Competing Interests Confronting the Legislature.

Undoubtedly a redistricting plan could have been devised that provided for greater equality, or that better served the interest in preserving pre-existing districts, or that avoided all incumbent battles, or that better respected county lines, or that created more compact districts. But the Legislature settled on the plan that it believed best balanced those sometimes competing interests and that, in the end, reasonably promoted all of them. Redistricting and reapportionment are quintessentially political; they cannot be accomplished without give and take and compromise. "The apportionment task, dealing as it must with 'fundamental choices about the nature of representation,' *Burns v. Richardson*, 384 U.S. [73,] 92 [(1966)], is primarily a political and legislative process. *Reynolds v. Sims*, 377 U.S. at 586." *Gaffney*, 412 U.S. at 749. This Court has consistently recognized that legislatures must be permitted to accommodate multiple interests in crafting their redistricting plans. *E.g.*, *White v. Regester*, 412 U.S. at 764 n.8; *Mahan v. Howell*, 410 U.S. at 327-28 & n.9.

Based on the foregoing discussion, the West Virginia Legislature's "plan for apportionment of the [Senate] may reasonably be said to advance the rational state polic[ies] of respecting the boundaries of political subdivisions[,]" of promoting compactness, of honoring communities of

interest, of maintaining Kanawha County as two districts bounded by its county lines, of preserving the cores of pre-existing districts, and of avoiding incumbent contests. *Mahan v. Howell*, 410 U.S. at 328. Thus, "[t]he remaining inquiry is whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." *Id.*

F. The Minor Population Disparities Resulting from the Legislature's Efforts to Further the Above-Identified State Interests Do Not Exceed Constitutional Limits.

"Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not." *Mahan v. Howell*, 410 U.S. at 329. Despite the frequent lack of certainty in making the determination about whether the State has justified some departure from perfect equality, the above discussion renders this "remaining inquiry" somewhat anti-climatic, given the importance and legitimacy of the State's justifications and the degree to which § 1-2-1 furthers them balanced against a minor population deviation. Not only is the Senate Plan's 10.92% variance barely over the 10% line that makes out a prima facie case and significantly less than the "relatively minor" 16.4%[7] sustained under similar (and arguably

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[7] The Virginia House plan in *Mahan* had 52 districts and "nine [17.3%] exceeded a 6% variance from the ideal." 410 U.S. at 319. By contrast, none of the districts in § 1-2-1's Plan exceed 6%, and only two (or 11.86%) – the two superimposed on Kanawha County – exceed 5%.

lesser) justification in *Mahan*, but it is way below any level that this Court has thus far invalidated in a legislatively-drawn state or local redistricting plan.[8] Indeed, appellees are unaware of any case decided by any Court since *Mahan* in which a redistricting with a maximum variance under 11% was overturned, at least where the State offered some legitimate justification for the variance.[9] Meanwhile, at least one other court – besides the district court in this case – has concluded that the state's interests in preserving county lines and the cores of prior districts justify a maximum variation around 11%. *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1036-37 (D. Md. 1994) (3-judge court) (upholding a plan with a maximum deviation of 10.67%).[10]

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[8] Although discounting the value of bottom line comparisons, the Court in *Mahan* nevertheless observed that, "The most stringent mathematical standard that has heretofore been imposed upon an apportionment plan for a state legislature by this Court was enunciated in *Swann v. Adams*, 385 U.S. 440 (1967), where a scheme having a maximum deviation of 26% was disapproved." 410 U.S. at 328. That statement remains accurate. *See also* n.2, *supra*; *but cf. Langsdon v. Millsaps*, 836 F. Supp. 447 (W.D. Tenn. 1993), *summarily aff'd sub. nom. Millsaps v. Langsdon*, 510 U.S. 1160 (1994) (mem.). Of course, the Court has held court-drawn plans to higher standards and invalidated them at levels lower than *Swann*. *See Connor v. Finch*, 431 U.S. 407 (1977); *Chapman v. Meier*, 420 U.S. 1 (1975).

[9] In *Smith v. Idaho Commission of Redistricting*, 38 P.3d 121 (Idaho 2001), the Idaho Supreme Court struck down a legislative scheme having a 10.69% maximum variance. The Court stated, however, that "the State has not presented *any* evidence that the reason(s) for the population disparity result from advancement of a rational state policy." *Id.* at 124 (emphasis in the original).

[10] To the extent that § 1-2-1 creates a minor geographical inequality between the southwestern counties and the Eastern Panhandle, the Legislature's plan for redistricting its House of Delegates greatly mitigates that inequality by removing one delegate

(Continued on following page)

Taking into account, then, the weight and applicability of the Legislature's legitimate interests and the minimal nature of the deviation from perfect equality, the result necessarily follows that the redistricting plan in West Virginia Code 1-2-1 is constitutional.

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each from McDowell County and Kanawha County and transplanting them to the Eastern Panhandle. W. Va. Code 1-2-2. The Plan also underpopulated each of the Eastern Panhandle's ten districts, with variances ranging between 2.43 and 5.00% below the ideal. Although a substantial deviation in one house of a bicameral legislature cannot, for equal protection purposes, be justified solely by an offset in the other house, this Court has made clear that it is at least appropriate to consider a redistricting plan as a whole. *Brown v. Thomson*, 462 U.S. at 862 n.9. As in this case, where the deviations from equality are minor to begin with, the countervailing effect of the House Plan in the 2001 redistricting Act in underpopulating the Eastern Panhandle districts defeats any hint of geographical bias by the Legislature.

CONCLUSION

The district court in this case correctly applied settled law. This Court should therefore affirm that decision.

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(3)

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In The
Supreme Court of the United States

JOHN UNGER, II, JOHN OVERINGTON, ELIZABETH BLAKE, GREGORY CORLISS, JERRY M. MAYS, KENNETH MAYS, BILL MOORE, SHIRLEY MOORE, CLARENCE PENNINGTON, WILLIAM C. RITCHIE and PHILLIP SPRIGGS,

Appellants,

v.

JOSEPH MANCHIN, III, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of West Virginia

REPLY TO APPELLEES' MOTION TO AFFIRM

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14 pg

QUESTION PRESENTED

WHETHER THE REASONS SET FORTH BY WEST VIRGINIA ARE SUFFICIENT TO JUSTIFY DILUTION OF THE STATE SENATE VOTES OF OVER THREE-FOURTHS OF A MILLION WEST VIRGINIANS WHERE 1) WEST VIRGINIA VIOLATED ITS OWN CONSTITUTION BY DIVIDING ELEVEN COUNTIES; AND 2) THE ACTUAL MOTIVATION FOR THE VIOLATION OF THE EQUAL PROTECTION CLAUSE WAS A DESIRE TO TREAT ONE COUNTY DIFFERENTLY THAN THE OTHER 54.

Appellees have objected to the framing of the question presented by the appellants. It is nevertheless true that H.B. 511 "directly contravenes Article VI, §4 of the West Virginia Constitution." Amended Memorandum Opinion of the District Court, App. 5. Moreover, for each of the justifications cited as favoring the retention of Kanawha County's four senators, similar concerns were ignored elsewhere. The justifications violated the West Virginia Constitution and were inconsistently applied.

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ARGUMENT

Over 779,000 West Virginians (43%) live in seven senate districts which are more than 10% underrepresented. Appellees concede Appellants have stated a *prima facie* case. Thus, the burden shifted to Appellee.

Appellees claim that the 10.92% maximum deviation renders the burden on West Virginia relatively light. However, as this Court said in *Swann v. Adams,* 385 U.S. 440 (1967), "the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State," *Id.,* at 445. Moreover, "What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case," *Reynolds v. Sims,* 377 U.S. 533, 578 (1964).[1] It is improper to suggest that smaller deviations render the state's burden lighter. What is required is justification of the deviations from the ideal based upon the particular circumstances of the case.

In *Karcher v. Daggett,* 462 U.S. 725 (1983) a congressional redistricting case, the Court said, "the State must, however, show with some specificity that a particular objective *required* the specific deviations in its plan, rather than simply relying on general assertions," (emphasis added), 462 U.S. 715, at 721.

This is the heart of the problem with Appellees' position: there is no specific showing that the dictates of the West Virginia Constitution required Kanawha Countians to retain 10-plus percent more political power than 43% of the state's citizens. On its face, the term "required" means there are no alternatives which would work equally well to achieve the objectives *without* requiring a deviation that dilutes the votes of 43% of West Virginians. West Virginia has not and cannot make the required showing since there are readily available alternatives that do not require maximum deviations in excess of 10%. These will be discussed in the following section.

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[1] *See, also, Karcher v. Daggett,* 462 U.S. 725, at 741: The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

A. The Two Panhandles and Cabell County Do Not Require that County Lines be Cut or that Kanawha County be Overrepresented.

At certain points in the redistricting, state constitutional *requirements* such as "bounded by county lines," and the federal constitutional requirement of proportional representation, were both compromised so that lesser values such as protecting Kanawha County's four resident senators could be achieved.

The Appellees call this proof that this process is a balance of competing interests. However, first among the interests that a legislature must observe is its own constitution. An essential difficulty with West Virginia's position in this case is that it claims that the bounded by county lines requirement was only violated in order to achieve closer population equality. In two cases, Ohio and Upshur counties, West Virginia now admits this is not so. It is also not true in general.

Appellees cite the example of Jefferson and Berkeley Counties in the Eastern Panhandle, where a number of the Appellants reside, as proof that counties must be divided in order to equalize population. To see why that is not so, one need look no further than Kanawha County. In 1964 Kanawha County superimposed a second senate district within its borders. The same could have been done in the Eastern Panhandle in 2001. Had it been done, the combined 15th and 16th Districts could have looked like this:

Jefferson	42,190
Berkeley	75,905
Morgan	14,943
Mineral	27,078
Hampshire	20,203
Hardy	12,699
Grant	11,299
	204,317

Berkeley, Jefferson, Morgan, Hampshire and Hardy are in the top ten fastest growing counties in West Virginia. Most of these counties previously shared two senators under prior reapportionments. Most importantly, no division of any county is required to achieve two combined senate districts which are only about 4% below the ideal size. Impossible? Only if you see Kanawha County as entitled to a different sort of equal protection than the Eastern Panhandle.

Much is made by Appellees of the existence of two panhandles in West Virginia and the problems created by counties

which only border one other county. Having just shown how contiguousness, compactness, observance of county lines and equality of representation could all be improved in the Eastern Panhandle by superimposing one district upon another, we should note that, in the Northern Panhandle (District 1), the populations of Hancock, Brooke and Ohio Counties, if undivided, total as follows:

Brooke	25,447
Hancock	32,667
Ohio	47,427
	105,541

This is less than 1,000 from the ideal of 106,373! By dividing Ohio County the legislature moved District 1 *further* from the ideal. By using a superimposed district in the Eastern Panhandle and refusing to divide Ohio County, equality in both panhandles would have been achieved with *no* divided counties. Unique geography played no role here.

A whole new range of solutions is presented if a senate district is added, as the Legislature also did for Kanawha County in 1964. With 18 districts, the ideal size is (1,808,344 ÷ 18), or 100,463.5. This would permit Kanawha County to retain four senators at very close to ideal size (100,036.5 per district). What Appellees really sought (retention of four senators in Kanawha) could have been achieved painlessly. Meanwhile, the combined Eastern Panhandle districts could remain within the proper size by the removal of Grant County to another district.

Without dividing Ohio County, Senate District 1 would be only 5.05% above the ideal in the 18-district scenario. In addition, Cabell County, with its population of 96,784, would be only about 3.7% below the ideal. Thus, in the areas cited as problematic by the Appellees, there were simpler and better solutions at hand that were never tried[2].

Further solutions appear possible if a senate district is removed, and superimposed districts are used. These were never tried, either.

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[2] Had appellants been permitted discovery, the failure of the Appellees to even try these solutions would have been explored further. Without proof that changing the number of districts or superimposing one upon another was tried, West Virginia cannot prove it was impossible.

The Legislature declared it impossible to achieve equality without cutting county lines, then used this declaration as *carte blanche* to put split counties in 14 of the 17 senate districts, while saying it would be improper to split Kanawha. There were alternatives that could have achieved greater equality for a larger number of people and these alternatives were never tried, or even preliminarily mapped. There can be no doubt that by using superimposed districts and/or more districts, both equality and whole-county concerns can be served. West Virginia has not shown that it was required to dilute the votes of 779,000 West Virginians. It had the burden of proof.

Appellee claims it is impossible to avoid splitting counties. No discovery was permitted. On the contrary, there may be a combination of techniques which could achieve a perfect balance. We cannot say in this case, because the Legislature claimed it was impossible without trying or proving it, and the Appellants were denied the opportunity to explore what proof there was on the issue. Constitutionally required equality could have been achieved through the methods outlined above (increasing or decreasing the number of districts and/or superimposing districts).

In West Virginia Code § 1-2-1, the Legislature claims that it "[d]eviated from the long-established state policy [of creating districts bounded by county lines] *only* when necessary to ensure all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population."[3] (Emphasis added.) Now the Appellees concede that this is true in "all but two instances." Motion to Affirm, at 10. This is the quality of the justification proffered, and the question before the court is whether reasons this poor can ever rebut a *prima facie* case.

Finally, and most simply, the Legislature could have added Roane County to Kanawha's two superimposed districts, as outlined in Plan 28e5. Pet. App. 71. At page 11 of the Motion to

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[3] Appellees cite Ohio, Upshur and Wyoming Counties as having only "minimal intrusions into their borders." Motion to Affirm, at 10. It is true in the case of Ohio County, but in both Upshur and Wyoming (as well as Mercer) independent, non-contiguous chunks of the counties were removed. In both Upshur and Wyoming, the "minimal intrusion" comprises more than 10% of the county's population.

Affirm, Appellees discuss the reasons who this could not be done, none of which are required by the state constitution, or historical practice.

Appellees say that two of the districts' four senators would be required to come from Roane County, a result a "rational legislator" would wish to avoid. There is no explanation of why rational legislators would wish to avoid the requirements of the state constitution, except the claim that it would "be a case of the tail wagging the dog," and that "sparsely populated Roane County" has different interests from those confronting Kanawha County. These are objectives only applied to Kanawha County, and were apparently unavailable to other counties.

First, avoiding "tail wagging the dog" scenarios has never been given any weight by this Court, especially where the state constitution requires it. The second justification merits close scrutiny by this court. "Sparsely populated" Roane County is contrasted with (presumably urban) Kanawha. Charleston is a town of some 50,000 persons in a vast county of 200,000. Like Roane County and the rest of West Virginia, Kanawha County is sparsely populated. And what if it were not? Senator Robert Plymale of rural Wayne County has been wagging the Cabell County dog for years. *Mahan v. Howell*, 410 U.S. 315 (1973), requires proof of *consistent* application of the justifications cited by the state. In Cabell County, which contains Huntington,[4] the legislature cobbled on a tiny sliver of Wayne County to make a district of nearly ideal size. Monongalia County, with some 90,000 residents, is split into *three* fragments. So are Mercer and Wyoming. District 3 contains Parkersburg, one of the largest cities in West Virginia. Since Wood County, where Parkersburg is located, has some 88,000 residents, it was joined with Pleasants (pop. 7,514), Wirt (pop. 5,813, smallest in West Virginia) and a portion of Roane County (9,340 of 15,446 total residents) to make a district. Since Wood is in a multi-county district, it gets only one senator. The Pleasants County rural tail wagging the Wood County "urban" dog is Senator Donna Boley. The West Virginia Constitution requires nothing less.

Interestingly, the overpopulated District 3 contains more than half of the very same Roane County residents whose interests are so different from those of their neighbors in Kanawha. *see,* Pet. App. 51. Kanawha County cannot share a

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[4] West Virginia's second largest city, Huntington is approximately the same size as Charleston.

district with its next door neighbor, Roane, because their interests are too different. Somehow, in the same redistricting, Roane *can* be parcelled between districts[5] with which it has much less in common, and whose population centers are much further away from Roane than Charleston.

Roane Countians work in Kanawha County. Very few work in Parkersburg because it is too far away. If combining communities of interest is a great concern, West Virginia could have had that *and* closer equality at once. As with the bounded-by-county lines requirement, Appellees are arguing that the two values are in conflict when they are not.

Except in Kanawha County, there are a variety of methods West Virginia has used in dealing with the differing interests combined within a single district, some of which violate the state constitution. By far the most popular means chosen by West Virginia to deal with these divergent interests within a single district has been to ignore them, as was done in the Fifteenth District, which the lower court found to stretch over 200 miles from Pocahontas to Berkeley Counties, including mountainous timber counties with part of the Washington-Baltimore Metropolitan Statistical Area. We are told this was "unavoidable,"[6] yet the combined 15-16th Senate Districts outlined above avoid it quite neatly, with a contiguous, much more compact area that is closer to equality.

The justifications put forth are justifications for treating Kanawha County differently. They were not consistently applied across the state, and treating Kanawha County differently is not an appropriate objective in equal protection terms.

Since West Virginia has not proved that the maximum deviation was required by, or incident to, the consistent application of rational state policies, the District Court erred in granting summary judgment.

B. West Virginia Has Not Shown that Preserving the Cores of Prior Districts or Minimizing Contests Between Incumbents Battles Drove the *Prima Facie* Violation of Equal Protection Here.

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[5] These are not idle, nitpicking concerns. The 3rd and 4th Districts both have more than 10% maximum deviation from Kanawha. *See*, Pet. App. 52, right hand column. To move Roane County cures both under population (Districts 8 and 17) and overpopulation (Districts 3 and 4) in one stroke.

[6] Motion to Affirm, at 14.

In *Karcher v. Daggett,* 462 U.S. 725 (1983), this Court held that, "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between incumbent[s] . . . ". 462 U.S. 725, at 740. Appellees in the instant case cited these reasons and more, but the District Court held that the policies set forth in the legislation are "the most reliable source of legislative intent," Pet. App. 10, and refused to consider them. Thus, no court has ever found that these policies were consistently applied, and Appellees did not cross appeal the District Court's refusal to consider these extra reasons. That issue would not appear to be properly before this Court. Nevertheless, Appellants will address it here.

First, adding Roane County to Kanawha's two superimposed districts would not offend any legitimate interest in preserving the core of the prior districts or avoiding contests between incumbents. The *Karcher* court said:

> The State however, must show with some specificity that a particular objective required the specific deviations .... The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

462 U.S. 725, at 74 (1983).

Indeed, it must be noted that preserving prior districts and avoiding contests between incumbents would be perfectly guaranteed if the legislature refused to redistrict at all. These objectives are diametrically opposed to equal protection where a trend of shrinkage exists in one area along with growth in another[7]. In the first instance, the West Virginia Constitution requires that redistricting take place "after every [U.S.] census . . . " West Virginia Constitution, Art VI, § 4. Redistricting is required to alter the senate districts so as to make them "as nearly as practicable, equal in population . . . . " *Id.*

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[7] In other words, if your population shrinks dramatically while other parts of the state grow dramatically, you might lose a senator. This is the essence of proportional representation.

Thus, the driving purpose is to equalize population. Neither the state constitution not the legislation makes any mention of preserving prior districts or avoiding contests between incumbents.

As to the latter, incidentally, both the President of the West Virginia Senate and the Speaker of the House denied in their answer to the Complaint that the senate districts were drawn to protect incumbents. Only later was this canard raised by counsel. It was properly ignored by the District Court, and should be ignored here. It might in some instances be a legitimate policy, but it was not an objective sought by the West Virginia Legislature.

Plan 28e5 would do no violence to any legitimate objective. Moreover, through adding or subtracting senate districts, it may well be that the objectives would not suffer under other, even more equipopulous plans. The burden was on West Virginia to show "with some specificity that these objectives required the deviations in the plan . . . " *Karcher, supra.,* at 741.

West Virginia has made no such showing. The District Court erred.

C. The Senate Plan Enacted in H.B. 511 Failed to Account for Ongoing, Severe Population Shifts and, in the Interest of Protecting Kanawha County's Residents, Violated the Equal Protection Rights of 779,000 West Virginians

The District Court noted that:

> Kanawha's population decline has occurred at the same time that counties in West Virginia's 'Eastern Panhandle' and Putnam County, which borders Kanawha on the West, have experienced significant population growth, a trend which appears to be continuing.

Pet. App. 5.

The senate redistricting plan at issue here places the largest population in District 4, where Putnam County is located. The third and fourth most populous districts are 15 and 16, the "Eastern Panhandle." The least populous districts are 8 and 17, comprised of Kanawha County.

The trend is continuing, and every year the dilution of the voting power of Districts 4, 15 and 16 will likewise continue, spurred on by the continuing shrinkage of Kanawha and the

southern coalfields. A maximum deviation of 10.92% is the best this plan will ever produce. This plan systematically underpopulates the shrinkage areas and systematically overpopulates the growth areas. The result is continued movement *away* from equality over time.

Appellees say this was largely mitigated by underpopulation of some of the Eastern Panhandle House Districts. This assertion was argued in the District Court, and rebutted by a showing that over 20% of all West Virginians were under represented in both the House *and* the Senate. In any event, even in the Eastern Panhandle, such underpopulation will not stave off the inevitable inequality that will be caused by growth in the Eastern Panhandle combined with shrinkage in Kanawha and the coalfields. By the time of the 2000 Census, Senate District 6 had fewer than 90,000 residents and District 16 had over 130,000. Whether intentionally or not, the legislation is constructed to worsen inequality over time.

District 4 is the most overpopulated senate district. Most of its population is served in the House by delegate districts which are overpopulated as well. On the other hand, Kanawha County contains an underpopulated house district. The residents of that delegate district have by far the most political power in the state, while most of District 4 has the least power in the state. This is not a balance which satisfies equal protection.

It is by now clear that the driving force behind the senate redistricting was the protection of Kanawha County and the other shrinkage areas of West Virginia, at the expense of the rights of those in the growth areas. All of the justifications put forth by Appellees are consistently applied – in Kanawha County. That which was most consistently applied across the state – preservation of pre-existing districts – has not been shown to have required the specific deviations which occurred.

Most significantly, Appellees can cite no case where a state constitutional requirement, such as the bounded by county lines requirement, was so roundly ignored across the state then cited as a justification. Fourteen of the districts contain split counties; eleven of fifty-five (20 percent) of the counties were split. The clear evidence below was that closer equality *and* fewer county splits were available in not just one, but several of the plans before the Legislature. Indeed, counsel has read no case from this Court where the state even attempted to justify

equal protection violations by reference to a state constitutional provision it had itself violated.[8]

CONCLUSION

West Virginia has failed to show that the population deviations were required by, or incident to, the consistent application of legitimate state policies. At best, the justifications consisted of the general assertions of counsel. Appellants were wrongfully denied discovery to test the claims of the state, but in any event, those claims were not proved. If justifications this inadequate, applied this inconsistently, serve to rebut a *prima facie* case, then little remains of this Court's precedent in state redistricting cases. The Appellants respectfully request that this Court note probable jurisdiction.

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[8] Counsel of Record for Appellees is the author of the leading scholarly work on the West Virginia Constitution. At page 131 of *The West Virginia Constitution: A Reference Guide,* Greenwood Press, 1995, the author states: "The third criterion, that the districts be 'bounded by county lines,' prevents the legislature from parceling counties to create districts and requires instead that they include only whole counties. This provision works against gerrymandering as well, but it also helps to preserve a political voice in the legislature for the county units and to protect the interests of smaller counties. [Citation Omitted] Despite the clarity of the provision, however, recent reapportionments have rather brazenly ignored it. The 1991 redistricting, for example, had only seven of the seventeen districts bounded entirely by county lines, and the 1982 senate had but two of its districts in compliance with section 4. The legislature's rationale for its failure to adhere to this section was that deviation from the county boundaries requirement was necessary to meet federal one-person – one-vote standards. That rationale is dubious, however, in light of alternative plans that were before the legislature and in light of its ability to enlarge the number of districts. [Citation Omitted] The courts have not decided whether the legislature's deviations from the whole-county requirement have been constitutional." *Id.,* at 131. *See, also, White v. Manchin,* 173 W.Va. 526, 318 S.E. 2d 470 (1984), n.8.